

THE GENERAL STATUTES OF NORTH CAROLINA

**CONTAINING GENERAL LAWS OF NORTH CAROLINA
ENACTED THROUGH THE SESSION LAWS OF 1981
(REGULAR SESSION, 1982)**

**Prepared under the Supervision of the Department of Justice
of the State of North Carolina**

**Annotated, under the Supervision of the Department of Justice,
by the Editorial Staff of the Publishers**

**UNDER THE DIRECTION OF
D. P. HARRIMAN, S. C. WILLARD, SYLVIA FAULKNER
AND P. R. ROANE**

Volume 2B

Part I

1982 Replacement Volume

THE MICHIE COMPANY

Law Publishers

CHARLOTTESVILLE, VIRGINIA

1982

THE GENERAL STATUTES OF
NORTH CAROLINA

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Volume 28

Part 1

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Scope of Volume

Statutes:

Full text of Chapters 53 through 57B of the General Statutes of North Carolina, including all enactments through the Session Laws of 1981 (Regular Session, 1982), heretofore contained in 1975 Replacement Volume 2B of the General Statutes of North Carolina and the 1981 Cumulative Supplement and 1982 Interim Supplement thereto.

Annotations:

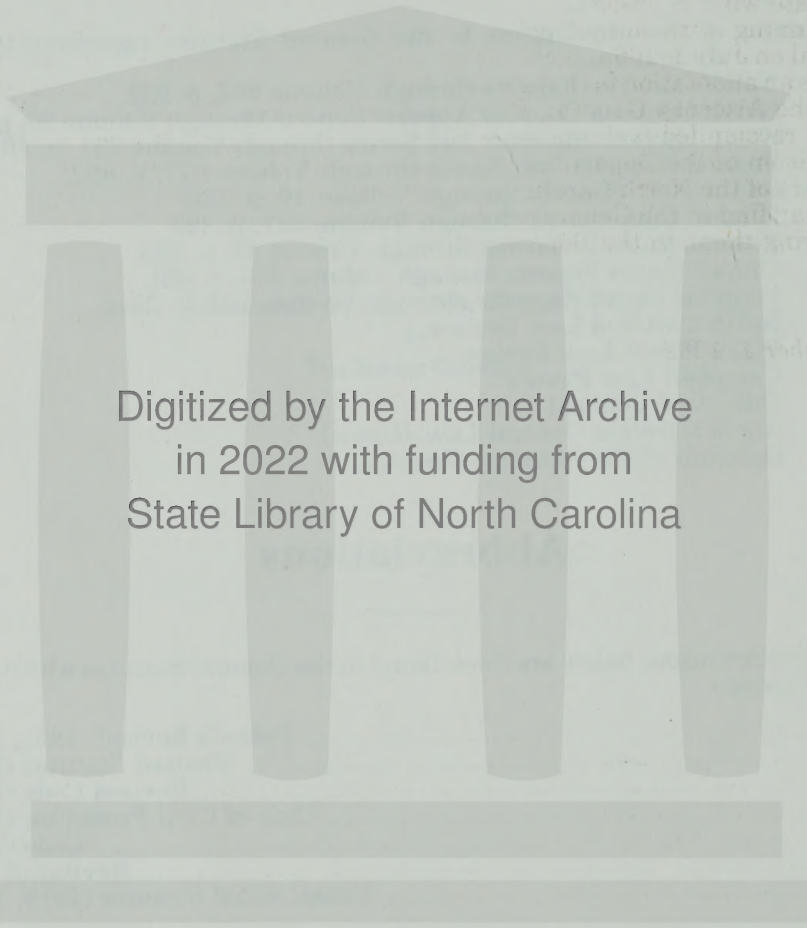
Sources of the annotations to the General Statutes appearing in this volume are:

- North Carolina Reports through Volume 302, p. 222.
- North Carolina Court of Appeals Reports through Volume 50, p. 567.
- South Eastern Reporter 2nd Series through Volume 291, p. 488.
- Federal Reporter 2nd Series through Volume 677, p. 882.
- Bankruptcy Reports through Volume 19, p. 123.
- Federal Supplement through Volume 537, p. 323.
- Federal Rules Decisions through Volume 93, p. 253.
- United States Reports through Volume 453, p. 691.
- Supreme Court Reporter through Volume 102, p. 2048.
- North Carolina Law Review.
- Wake Forest Law Review.
- Campbell Law Review.
- Duke Law Journal.
- North Carolina Central Law Journal.
- Opinions of the Attorney General.

Abbreviations

(The abbreviations below are those found in the General Statutes which refer to prior codes.)

P.R.	Potter’s Revisal (1821, 1827)
R.S.	Revised Statutes (1837)
R.C.	Revised Code (1854)
C.C.P.	Code of Civil Procedure (1868)
Code	Code (1883)
Rev.	Revisal of 1905
C.S.	Consolidated Statutes (1919, 1924)



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Preface

Volume 2B, last replaced in 1975, accumulated a supplement approaching the bound volume in size and including, among other things, extensive changes in the statutes relating to financial institutions, corporations and insurance. Due to the substantial increase in the amount of material incorporated in Volume 2B, the current replacement is accomplished by the division of the volume into two separate volumes, Volume 2B, Parts I and II. These 1982 Replacement Volumes are issued to incorporate the new material in the bound volumes and to eliminate what is obsolete.

Beginning with formal opinions issued by the North Carolina Attorney General on July 1, 1969, such opinions which construe a specific statute will be cited as an annotation to that statute. For a copy of an opinion or of its headnotes write the Attorney General, P.O. Box 629, Raleigh, N.C. 27602.

The recompiled volume has been prepared and published under the supervision of the Department of Justice of the State of North Carolina. The members of the North Carolina Bar are requested to communicate any defects they may find in the General Statutes, and any suggestions they may have for improving them, to the Department.

RUFUS L. EDMISTEN
Attorney General

November 1, 1982

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ARTICLE 1.**Definitions.****§ 53-1. "Bank," "surplus," "undivided profits," and other words defined.**

The following definitions shall be applied to the terms used in this Chapter:

- (1) **Bank.** — The term "bank" shall be construed to mean any corporation, other than building and loan associations, industrial banks, and credit unions, receiving, soliciting, or accepting money or its equivalent on deposit as a business.
- (2) **Demand Deposits.** — The term "demand deposits" means all deposits, the payment of which can be legally required within 30 days.
- (3) **Insolvency.** — The term "insolvency" means:

- a. When a bank cannot meet its deposit liabilities as they become due in the regular course of business;
 - b. When the actual cash market value of its assets is insufficient to pay its liabilities to depositors and other creditors;
 - c. When its reserve shall fall under the amount required by this Chapter, and it shall fail to make good such reserve within 30 days after being required to do so by the Commissioner of Banks;
 - d. Whenever the undivided profits and surplus shall be inadequate to cover losses of the bank, whereby an impairment of the capital stock is created.
- (4) **Net Earnings.** — The term "net earnings" means the excess of the gross earnings of any bank over the expenses and losses chargeable against such earnings during any dividend period.
- (5) **Practical Banker.** — The term "practical banker" means an officer or employee of a bank actively engaged in performing duties in managing or supervising or assisting in managing or supervising the conducting of a banking business, including any such banker who is in a retired status from such duties.
- (6) **Surplus.** — The term "surplus" means a fund created pursuant to the provisions of this Chapter by a bank from payments by stockholders or from its net earnings or undivided profits which, to the amount specified and by any additions thereto set apart and designated as such, is not available for the payment of dividends, and cannot be used for the payment of expenses or losses so long as such bank has undivided profits.
- (7) **Time Deposits.** — The term "time deposits" means all deposits, the payment of which cannot be legally required within 30 days.
- (8) **Undivided Profits.** — The term "undivided profits" means the credit balance of the profit and loss account of any bank.
- (9) **Unimpaired Capital Fund.** — The term "unimpaired capital fund" means the total of the amount of unimpaired common stock, preferred stock, surplus, and the amount of capital debentures or notes, convertible or otherwise, having an average original maturity of at least seven years, which have been specifically designated as part of the bank's unimpaired capital fund by resolution duly adopted by the board of directors of the bank; provided, that upon payment of such capital debentures or notes or upon accumulation of funds in a sinking fund for amortization of such debentures or notes, unimpaired capital fund shall be reduced by the amount of such payment or accumulation. The terms and conditions of any issue of or prepayment of capital debentures or notes must have the prior written approval of the Commissioner of Banks affirming that in his opinion such issue or prepayment is in the best interest of the depositors, creditors and stockholders of the bank. (1921, c. 4, s. 1; C.S., s. 216(a); 1927, c. 47, s. 1; 1931, c. 243, s. 5; 1945, c. 743, s. 1; 1967, c. 789, s. 21; 1979, c. 483, s. 2.)

Cross References. — As to definitions of "commercial and business paper" and "trade acceptance," see § 53-55. As to definition of "bank acceptances," see § 53-56. As to definition of "goods," see § 53-56. As to definition of "reserve," see § 53-51. As to definition of "Federal Reserve Act," "Federal Reserve Board," "federal reserve banks," and "member bank," see § 53-61. As to definition of "bank" as used in the Uniform Commercial Code, see

§ 25-1-201. As to demand deposits, see § 53-65.

Editor's Note. — In 1921 the General Assembly passed an act which enlarged the former Corporation Commission's powers of supervision over banks and made more specific regulations for the business of banking. See *Litchfield v. Roper*, 192 N.C. 202, 134 S.E. 651 (1926). By Public Laws 1931, c. 243, all the powers vested in the Corporation Commission with respect to banks were transferred to the

Commissioner of Banks, and former laws relating to banks and banking were conformably amended. See *Blades v. Hood*, 203 N.C. 56, 164 S.E. 828 (1932). See also § 53-92 et seq.

Legal Periodicals. — For comment on usury law in North Carolina, see 47 N.C.L. Rev. 761 (1969).

CASE NOTES

Definition of "insolvency" is correct. *State v. Shipman*, 202 N.C. 518, 163 S.E. 657 (1932).

Cited in *Lenoir Fin. Co. v. Currie*, 254 N.C. 129, 118 S.E.2d 543 (1961).

ARTICLE 2.

Creation.

§ 53-2. How incorporated.

Any number of persons, not less than five, who may be desirous of forming a company and engaging in the business of establishing, maintaining, and operating banks of discount and deposit to be known as commercial banks, or engaging in the business of establishing, maintaining, and operating offices of loan and deposits to be known as savings banks, or of establishing, maintaining, and operating banks having departments for both classes of business, or operating banks engaged in doing a trust and fiduciary business, shall be incorporated in the manner following and in no other way; that is to say, such persons shall, by a certificate of incorporation under their hands and seals set forth:

- (1) The name of the corporation; no name shall be used already in use by another existing corporation organized under the laws of this State or of the Congress, or so nearly similar thereto as to lead to uncertainty or confusion.
- (2) The location of its principal office in this State.
- (3) The nature of its business, whether that of a commercial bank, savings bank, trust company, or a combination of two or more or all of such classes of business.
- (4) The amount of its authorized capital stock, the number of shares into which it is divided, the par value of each share; the amount of capital stock with which it will commence business, which shall not be less than one hundred thousand dollars (\$100,000) in cities or towns of 3000 population and under; one hundred fifty thousand dollars (\$150,000) in cities or towns of more than 3000 population and less than 10,000 population; two hundred thousand dollars (\$200,000) in cities or towns of more than 10,000 population and less than 25,000 population; two hundred fifty thousand dollars (\$250,000) in cities or towns of more than 25,000 population and less than 50,000 population; or three hundred thousand dollars (\$300,000) in cities or towns of more than 50,000 population; and in addition shall have a paid-in surplus of at least fifty percent (50%) of the authorized capital stock, as hereinbefore set out; the population to be ascertained by the last preceding national census: Provided, that this subdivision shall not apply to banks organized and doing business prior to its adoption. Provided, further, that fractional shares may be issued for the purpose of complying with the requirements of G.S. 53-88. The Banking Commission is hereby authorized and directed to adopt rules and regulations to keep such original required minimum capital funds intact to the end that they remain in and with the bank as a protection for depositors.

- (5) The names and post-office addresses of subscribers for stock, and the number of shares subscribed by each; the aggregate of such subscriptions shall be the amount of the capital with which the company will commence business.
- (6) Period, if any, limited for the duration of the company. (1921, c. 4, s. 2; C.S., s. 217(a); 1927, c. 47, s. 2; 1929, c. 72, s. 1; 1947, c. 781; 1953, c. 1209, s. 3; 1963, c. 793, s. 2; 1967, c. 789, s. 1.)

Cross References. — As to provision for branch banks, see § 53-62.

CASE NOTES

Banking corporation is wholly a creature of statute, doing business by legislative grace, and the right to carry on a banking business through the agency of a corporation is a franchise which is dependent on a grant of cor-

porate powers by the State. *Young v. Roberts*, 252 N.C. 9, 112 S.E.2d 758 (1960).

Cited in *Cocke v. Hood*, 205 N.C. 832, 170 S.E. 637 (1933).

§ 53-3. Certificate of incorporation; how signed, proved and filed.

The certificate of incorporation shall be signed by the original incorporators, or a majority of them, and shall be proved or acknowledged before an officer duly authorized under the laws of this State to take proof or acknowledgment of deeds, and shall be filed in the office of the Secretary of State. The Secretary of State shall forthwith transmit to the Commissioner of Banks a copy of said certificate of incorporation, and shall not issue or record the same until duly authorized so to do by the Commissioner of Banks as hereinafter provided. (1921, c. 4, s. 3; C.S., s. 217(b); 1931, c. 243, s. 5.)

CASE NOTES

Suit upon Refusal to Issue Charter. — Where plaintiffs applied for an industrial bank charter, and their application was not passed upon by the Secretary of State on the advice and recommendation of the Commissioner of Banks, acting in accordance with § 53-4, and plaintiffs sued to compel the issuance of a charter, alleging no capricious acts, bad faith or

disregard of law by the State officers, the complaint did not state a cause of action and was not sufficient as a petition for certiorari or as an application for mandamus. *Pue v. Hood*, 222 N.C. 310, 22 S.E.2d 896 (1942).

Cited in *Young v. Roberts*, 252 N.C. 9, 112 S.E.2d 758 (1960).

§ 53-4. Examination by Commissioner; when certification to be refused; review by Commission.

Upon receipt of a copy of the certificate of incorporation of the proposed bank, the Commissioner of Banks shall at once examine into all the facts connected with the formation of such proposed corporation including its location and proposed stockholders, and if it appears that such corporation, if formed, will be lawfully entitled to commence the business of banking, the Commissioner of Banks shall so certify to the Secretary of State, unless upon examination and investigation he finds that

- (1) The proposed corporation is formed for any other than legitimate banking business; or

- (2) That the character, general fitness, and responsibility of the persons proposed as stockholders in such corporation and directors, officers, and other managerial officials are not such as to command the confidence of the community in which said bank is proposed to be located; or
- (3) That the probable volume of business and reasonable public demand in such community is not sufficient to assure and maintain the solvency of the new bank and of the then existing bank or banks in said community; or
- (4) That the name of the proposed corporation is likely to mislead the public as to its character or purpose; or
- (5) That the proposed name is the same as the one already adopted or appropriated by an existing bank in this State, or so similar thereto as to be likely to mislead the public.

Upon such certification the Secretary of State shall issue and record such certificate of incorporation.

Notwithstanding any other provisions of this section, the Commissioner of Banks shall not make the certification to the Secretary of State described above until he shall have ascertained that the establishment of such bank will meet the needs and promote the convenience of the community to be served by the bank. Any action taken by the Commissioner of Banks pursuant to this section shall be subject to review by the State Banking Commission which shall have the authority to approve, modify or disapprove any action taken or recommended by the Commissioner of Banks. (1921, c. 4, s. 4; Ex. Sess. 1921, c. 56, s. 1; C.S., s. 217(c); 1931, c. 243, s. 5; 1953, c. 1209, s. 1; 1963, c. 793, s. 1; 1967, c. 789, s. 2.)

CASE NOTES

This section and § 53-92 are construed in pari materia. *Young v. Roberts*, 252 N.C. 9, 112 S.E.2d 758 (1960).

Scope of Duty and Discretion of Commissioner. — The duty imposed upon and the discretion vested in the Commissioner of Banks under this section bears only upon the question whether certain conditions exist justifying the creation of the proposed bank under the terms and procedure laid down in the statute. His action and the certificate issued thereon merely constitute the prescribed procedure to determine whether the franchise applied for was grantable under the law. *Pue v. Hood*, 222 N.C. 310, 22 S.E.2d 896 (1942).

Basis for Refusal to Issue Certificate. — If the certificate of incorporation complies with statutory requirements in all other respects, the authority of the Commissioner of Banks to refuse to issue such certificate to the Secretary of State must be based on a finding adverse to the proposed banking corporation in respect of one or more of the legislative standards defined

in this section. *Young v. Roberts*, 252 N.C. 9, 112 S.E.2d 758 (1960).

Review by State Banking Commission. — Any decision made by the Commissioner of Banks in the exercise of the responsibility and authority conferred upon him by this section is subject to review by the State Banking Commission upon application by any adversely affected interested person. *Young v. Roberts*, 252 N.C. 9, 112 S.E.2d 758 (1960).

Upon review of a decision of the Commissioner of Banks, the Commission has no authority to direct the Commissioner of Banks to refuse to issue a certificate of approval to a proposed banking corporation which is otherwise in compliance with statutory requirements, except on a finding adverse to the proposed banking corporation in respect of one or more of the legislative standards defined in this section. *Young v. Roberts*, 252 N.C. 9, 112 S.E.2d 758 (1960).

Cited in *Lenoir Fin. Co. v. Currie*, 254 N.C. 129, 118 S.E.2d 543 (1961).

§ 53-5. Certificate of incorporation, when certified.

Upon receipt of such certificate from the Commissioner of Banks, the Secretary of State shall, if said certificate of incorporation be in accordance with law, cause the same to be recorded in his office in a book to be kept for that purpose, and known as the corporation book, and he shall, upon the payment of the organization tax and fees, certify under his official seal two copies of the said certificate of incorporation and probates, one of which shall forthwith be recorded in the office of the register of deeds of the county where the principal office of said corporation in this State shall or is to be located, in a book to be known as the record of incorporations, and the other certified copy shall be filed in the office of the Commissioner of Banks, and thereupon the said persons shall be a body politic and corporate under the name stated in such certificate. The said certificate of incorporation, or a copy thereof, duly certified by the Secretary of State or the register of deeds of the county in which the same is recorded, or by the Commissioner of Banks, under their respective seals, shall be evidence in all courts and places, and shall, in all judicial proceedings, be deemed prima facie evidence of the complete organization and incorporation of the company purporting thereby to have been established. The charter of any bank which fails to complete its organization and open for business to the public within six months after the date of filing its certificate of incorporation with the Secretary of State shall be void: Provided, however, the Commissioner of Banks may for cause extend the limitation herein imposed. (1921, c. 4, s. 5; C.S., s. 217(d); 1931, c. 243, s. 5; 1967, c. 823, s. 3.)

CASE NOTES

Six-month limitation set out in the last sentence of this section applies only in the event the "said persons" have become "a body politic and corporate" and the certificate of incorporation has been recorded and issued. *Young v. Roberts*, 252 N.C. 9, 112 S.E.2d 758 (1960).

Only State May Take Advantage of Defect in Organization. — A defect in the organization of a bank because of failure to begin business within the specified time can be taken advantage of only by a direct proceeding by the State for that purpose. *Boyd v. Redd*, 120 N.C. 335, 27 S.E. 35 (1897).

§ 53-6. Payment of capital stock.

The capital stock of every bank shall be fully paid in, in cash, before it shall be authorized by the Commissioner of Banks to commence business and the full payment in cash of the capital stock shall be certified to the Commissioner of Banks under oath by the president and cashier of the said bank. Provided, that the stock sold by any bank in process of organization, or for an increase of the capital stock, shall be accounted for to the bank in the full amount paid for the same. No commission or fee shall be paid to any person, association, or corporation for selling such stock. The Commissioner of Banks shall refuse authority to commence business to any bank if commissions or fees have been paid, or have been contracted to be paid by it, or by anyone in its behalf, to any person, association, or corporation for securing subscriptions for or selling stock in such bank. (1921, c. 4, s. 6; C.S., s. 217(e); 1927, c. 47, s. 3; 1931, c. 243, s. 5.)

Cross References. — As to the similar provision relating to industrial banks, see § 53-140.

CASE NOTES

Capital Stock Required. — This section have capital stock. *Cooke v. Outland*, 265 N.C. expressly requires that domestic banks must 601, 144 S.E.2d 835 (1965).

§ 53-7. Statement filed before beginning business.

Before such company shall begin the business of banking, banking and trust, fiduciary, or surety business, there shall be filed with the Commissioner of Banks a statement under oath by the president or cashier, containing the names of all the directors and officers, with the date of their election or appointment, term of office, residence, and post-office address of each, the amount of capital stock of which each is the owner in good faith and the amount of money paid in on account of the capital stock. Nothing shall be received in payment of capital stock but money. (1921, c. 4, s. 7; C.S., s. 217(f); 1931, c. 243, s. 5.)

§ 53-8. Authorized to begin business.

Upon filing of such statement, the Commissioner of Banks shall examine into its affairs, ascertain especially the amount of money paid in on account of its capital, the name and place of residence of each director, the amount of capital stock of which each is the owner in good faith, and whether such corporation has complied with all the provisions of law required to entitle it to engage in business. If upon such examination it appears to the Commissioner of Banks that it is lawfully entitled to commence the business of banking, banking and trust, fiduciary, or surety business, he shall give to such corporation a certificate signed by the Commissioner of Banks, that such corporation has complied with all the provisions of the law required to be complied with, before commencing the business of banking, and that such corporation is authorized to commence business. (1921, c. 4, s. 8; C.S., s. 217(g); 1931, c. 243, s. 5.)

§ 53-9. Transactions preliminary to beginning business.

No such corporation shall transact any business except such as is incidental and necessarily preliminary to its organization until it has been authorized to do so by the Commissioner of Banks. (1921, c. 4, s. 9; C.S., s. 217(h); 1931, c. 243, s. 5.)

§ 53-10. Increase of capital stock.

(a) A corporation doing business under the provisions of this Chapter may increase its capital stock as provided by law for other corporations.

(b) A bank may, with the approval of the Commissioner of Banks and by the vote of the holders of at least two thirds of the stock of the particular class or classes of stock entitled to vote on such proposal, amend its charter to authorize an increase in the common stock of the bank in the category of authorized but unissued stock in an amount not to exceed ten percent (10%) of the outstanding shares of such class or classes of stock and shares so authorized shall be deemed released from preemptive rights. Such authorized but unissued stock may be issued from time to time to officers or employees of the bank pursuant to a stock option or stock purchase plan adopted in accordance with this Chapter. (1921, c. 4, s. 10; C.S., s. 217(i); 1965, c. 1032; 1967, c. 789, s. 3.)

§ 53-11. Decrease of capital stock.

A corporation doing business under the provisions of this Chapter may reduce its capital stock in the manner provided for other corporations upon a vote in favor of the decrease of two thirds in interest of each class of stockholders with voting powers: Provided, that no bank shall reduce its capital stock to an amount less than the minimum required by law. Such reduction shall not be valid or warrant the cancellation of stock certificates until it has been approved by the Commissioner of Banks. Such approval shall not be given except upon a finding by the Commissioner of Banks that the security of existing creditors of the corporation will not be impaired. (1921, c. 4, s. 11; C.S., s. 217(j); 1931, c. 243, s. 5.)

§ 53-12. Merger or consolidation of banks.

A bank may merge or consolidate with or transfer its assets and liabilities to another bank. Before such merger or consolidation or transfer shall become effective, each bank concerned in such merger or consolidation or transfer shall file, or cause to be filed, with the Commissioner of Banks, certified copies of all proceedings had by its directors and stockholders, which said stockholders' proceedings shall set forth that holders of at least two thirds of the stock voted in the affirmative on the proposition of merger or consolidation or transfer. Such stockholders' proceedings shall also contain a complete copy of the agreement made and entered into between said banks, with reference to such merger or consolidation or transfer. Upon the filing of such stockholders' and directors' proceedings as aforesaid, the Commissioner of Banks shall cause to be made an investigation of each bank to determine whether the interests of the depositors, creditors, and stockholders of each bank are protected, and find such merger or consolidation is in the public interest, and that such merger or consolidation or transfer is made for legitimate purposes, and his consent to or rejection of such merger or consolidation or transfer shall be based upon such investigation. No such merger or consolidation or transfer shall be made without the consent of the Commissioner of Banks. The expense of such investigation shall be paid by such banks. Notice of such merger or consolidation or transfer shall be published for four weeks before or after the same is to become effective, at the discretion of the Commissioner of Banks, in a newspaper published in a city, town, or county in which each of said banks is located, and a certified copy thereof shall be filed with the Commissioner of Banks. In case of either transfer or merger or consolidation the rights of creditors shall be preserved unimpaired, and the respective companies deemed to be in existence to preserve such rights for a period of three years. (1921, c. 4, s. 12; C.S., s. 217(k); 1931, c. 243, s. 5; 1967, c. 789, s. 4; 1981, c. 671, s. 1.)

Cross References. — As to merger of corporations generally, see § 55-106 et seq. As to liquidation of banks, see § 53-20.

Effect of Amendments. — The 1981 amend-

ment, effective July 1, 1981, inserted "merge or" preceding "consolidate" in the first sentence and inserted "merger or" preceding "consolidation" throughout the section.

CASE NOTES

Presumption of Approval of Transaction. — Where under the provisions of this section a State bank transferred its assets to another State bank, the latter assuming the former's liabilities under a consolidation agreement, it was presumed that the former Corporation

Commission had notice or knowledge of the transaction coming within the scope of its duties, and had approved the transaction. *Corporation Comm'n v. Stockholders*, 199 N.C. 586, 155 S.E. 445 (1930).

§ 53-13. Merged or consolidated banks deemed one bank.

In case of merger or consolidation when the agreement of merger or consolidation is made, and a duly certified copy thereof is filed with the Secretary of State, together with a certified copy of the approval of the Commissioner of Banks to such merger or consolidation, the banks, parties thereto, shall be held to be one company, possessed of the rights, privileges, powers, and franchises of the several companies, but subject to all the provisions of law under which it is created. The directors and other officers named in the agreement of consolidation shall serve until the first annual meeting for election of officers and directors, the date for which shall be named in the agreement. On filing such agreement, all and singular, the property and rights of every kind of the several companies shall thereby be transferred and vested in such surviving company in the case of merger or in such new company in the case of consolidation, and be as fully its property as they were of the companies parties to the agreement. (1921, c. 4, s. 13; C.S., s. 217(l); 1931, c. 243, s. 5; 1981, c. 671, s. 2.)

Cross References. — As to substitution of a consolidated bank as executor or trustee under will, see § 31-19. As to fiduciary powers and liabilities of merged banks, see § 53-17.

Effect of Amendments. — The 1981 amendment, effective July 1, 1981, inserted "merger

or" preceding "consolidation" in three places in the first sentence and substituted "surviving company in the case of merger or in such new company in the case of consolidation" for "new company" in the third sentence.

§ 53-14. Reorganization.

Whenever any bank under the laws of this State or of the United States is authorized to dissolve, and shall have taken the necessary steps to effect dissolution, or upon a national bank making application to convert to a State-chartered bank, it shall be lawful for a majority of the directors of such bank, upon authority in writing of the owners of two thirds of its capital stock, with the approval of the Commissioner of Banks, to execute articles of incorporation as provided in this Chapter, which articles, in addition to the requirements of law, shall further set forth the authority derived from the stockholders of such national bank or State bank, and upon filing the same as hereinbefore provided for the organization of banks, the same shall become a bank under the laws of this State, and thereupon all assets, real and personal, of the dissolved national or State bank shall by operation of law be vested in and become the property of such State bank, subject to all liabilities of such national or State bank not liquidated under the laws of the United States or this State before such reorganization. (1921, c. 4, s. 14; C.S., s. 217(m); 1931, c. 243, s. 5; 1979, c. 483, s. 3.)

§ 53-15. Repealed by Session Laws 1947, c. 696.

§ 53-16. Consolidation, conversion or merger of State banks or trust companies with national banks.

(a) Nothing in the law of this State shall restrict the right of a State bank or trust company to consolidate, convert into, or merge with a national bank. The action to be taken by such consolidating, converting, or merging State bank and its rights and liability and those of its stockholders shall be the same as those prescribed by the law of the United States for national banks at the time of the action, except that a vote of the holders of two thirds of each class of voting stock of a State bank shall be required for the consolidation,

conversion, or merger and that upon consolidation, conversion, or merger by a State bank with or into a national bank the rights of dissenting stockholders shall be those hereinafter specified.

(b) Upon consolidation, conversion, or merger the resulting national bank shall be the same business as each consolidating, converting, or merging bank with all the property rights, powers, and duties of each consolidating, converting, or merging bank, except as affected by the law of the United States and by the charter and bylaws of the resulting bank, and any reference to a consolidating, converting, or merging bank in any writing, whether executed or taking effect before or after the consolidation, conversion, or merger shall be deemed and taken a reference to the resulting bank if not inconsistent with the other provisions of such writing.

(c) The holders of shares of the stock of a State bank which were voted against a consolidation, conversion, or merger into a national bank shall be entitled to receive their value in cash, if and when the consolidation, conversion, or merger becomes effective, upon written demand, made to the resulting national bank at any time within 30 days after the effective date of the consolidation, conversion, or merger accompanied by the surrender of the stock certificate or certificates. The value of such shares shall be determined as of the date of the stockholders' meeting approving the consolidation, conversion, or merger, by three appraisers, one to be selected by the owners of two thirds of the dissenting shares involved, one by the board of directors of the resulting national bank and the third by the two so chosen. The valuation agreed upon by any two appraisers shall govern. If the appraisal is not completed within 90 days after the consolidation, conversion, or merger becomes effective, the Comptroller of the Currency shall cause an appraisal to be made.

(d) The amount fixed as the value of the shares of stock of the consolidating, converting, or merging bank at the time of the stockholders' meeting approving the consolidation, conversion, or merger and the amount fixed by the appraisal as hereinbefore provided, where the fixed value is not accepted, shall constitute a debt of the resulting national bank.

(e) Upon the completion of the consolidation, conversion, or merger the permit to operate of any consolidating, converting, or merging State bank shall automatically terminate. (1929, c. 148, s. 1; 1951, c. 1129, s. 1.)

§ 53-17. Fiduciary powers and liabilities of banks or trust companies merging or transferring assets and liabilities.

Whenever any bank or trust company, organized under the laws of North Carolina or the acts of Congress, and doing business in this State, shall consolidate or merge with or shall sell to and transfer its assets and liabilities to any other bank or trust company doing business in this State, as provided by the laws of North Carolina or the acts of Congress, all the then existing fiduciary rights, powers, duties and liabilities of such consolidating or merging or transferring bank or banks and/or trust companies, including the rights, powers, duties and liabilities as executor, administrator, guardian, trustee, and/or any other fiduciary capacity, whether under appointment by order of court, will, deed, or other instrument, shall, upon the effective date of such consolidation or merger or sale and transfer, vest in, devolve upon, and thereafter be performed by, the transferee bank or the consolidated or merged bank or trust company, and such latter bank or trust company shall be deemed substituted for and shall have all the rights and powers of the transferring bank or trust company. (1931, c. 207; 1941, c. 80.)

Legal Periodicals. — For notes dealing with sale and transfer of assets, see 9 N.C.L. Rev. 398 and 19 N.C.L. Rev. 457.

CASE NOTES

Distinction is drawn between "consolidation" and "merger." Braak v. Hobbs, 210 N.C. 379, 186 S.E. 500 (1936).

Consolidated Bank Succeeds to Power as Trustee under Deed of Trust. — A bank, created as a result of a consolidation of several State banks, may properly exercise the power of sale contained in a deed of trust in which one of its constituent banks was named trustee, upon default by the trustor, since under this section the consolidated bank succeeds to such power. Braak v. Hobbs, 210 N.C. 379, 186 S.E. 500 (1936).

Retroactive Application of Section. — This section, although in form an independent statute, is in reality an amendment of Public Laws 1925, c. 77, codified as § 53-15 (now repealed) and former §§ 55-165 through 55-170, and is therefore applicable to a deed of trust executed prior to the enactment of this section and subsequent to the effective date of the 1925 act. Braak v. Hobbs, 210 N.C. 379, 186 S.E. 500 (1936).

ARTICLE 3.

Dissolution and Liquidation.

§ 53-18. Voluntary liquidation.

A bank may go into voluntary liquidation and be closed, and may surrender its charter and franchise as a corporation of this State by the affirmative votes of its stockholders owning two thirds of its stock, such vote to be taken at a meeting of the stockholders duly called by resolution of the board of directors, written notice of which, stating the purpose of the meeting, shall be mailed to each stockholder, or in case of his death, to his legal representative or heirs at law, addressed to his last known residence 10 days previous to the date of said meeting. Whenever stockholders shall by such vote at a meeting regularly called for the purpose, notice of which shall be given as herein provided, decide to liquidate such bank, a certified copy of all proceedings of the meeting at which said action shall have been taken, verified by the oath of the president and cashier, shall be transmitted to the Commissioner of Banks for his approval. If the Commissioner of Banks shall approve the same, he shall issue to the said bank, under his seal, a permit for such purpose. No such permit shall be issued by the Commissioner of Banks until said Commissioner of Banks shall be satisfied that provision has been made by such bank to satisfy and pay off all depositors and all creditors of such bank. If not so satisfied, the Commissioner of Banks shall refuse to issue a permit, and shall be authorized to take possession of said bank and its assets and business, and hold the same and liquidate said bank in the manner provided in this Chapter. When the Commissioner of Banks shall approve the voluntary liquidation of a bank, the directors of said bank shall cause to be published in a newspaper in the city, town, or county in which such bank is located, a notice that the bank is closing up its affairs and going into liquidation, and notify its depositors and creditors to present their claims for payment. When any bank shall be in process of voluntary liquidation, it shall be subject to examination by the Commissioner of Banks, and shall furnish such reports from time to time as may be called for by the Commissioner of Banks. All unclaimed deposits and dividends remaining in the hands of such bank shall be subject to the provisions of Chapter 116B. Whenever the Commissioner of Banks shall approve it, any bank may sell and transfer to any other bank, either State bank or national bank, all of its assets of every kind upon such terms as may be agreed upon and

approved by the Commissioner of Banks and by two-thirds vote of its board of directors. A certified copy of the minutes of any meeting at which such action is taken, under the oath of the president and cashier, together with a copy of the contract of sale and transfer, shall be filed with the Commissioner of Banks. Whenever voluntary liquidation shall be approved by the Commissioner of Banks or the sale and transfer of the assets of any bank shall be approved by the Commissioner of Banks, a certified copy of such approval under seal of the Commissioner of Banks, filed in the office of the Secretary of State, shall authorize the cancellation of the charter of such bank, subject, however, to its continued existence, as provided by this Chapter and the general law relative to corporations. (1921, c. 4, s. 15; C.S., s. 218(a); 1927, c. 47, s. 4; 1929, c. 73; 1931, c. 243, s. 5; 1979, 2nd Sess., c. 1311, s. 3.)

Cross References. — As to dissolution and liquidation of corporations generally, see § 55-114 et seq.

Effect of Amendments. — The 1979, 2nd Sess., amendment, effective January 1, 1981, substituted "Chapter 116B" for "this Chapter

as hereinafter provided" at the end of the eighth sentence.

Legal Periodicals. — For article discussing the statutory changes made in the North Carolina banking law, see 11 N.C.L. Rev. 194.

CASE NOTES

Approval of Stockholders Not Necessary for Sale of Assets. — For a valid sale of assets to another bank the approval of the stockholders of the selling bank is not required by this section, and the section is not invalid for that reason. *Planters' Sav. Bank v. Earley*, 204 N.C. 297, 168 S.E. 225 (1933).

As to enforcement of former statutory lia-

bility of stockholders by purchasing bank, see *Peoples Bank & Trust Co. ex rel. Wayne Nat'l Bank v. Roscower*, 199 N.C. 653, 155 S.E. 560 (1930).

Applied in *Douglass v. Dawson*, 190 N.C. 458, 130 S.E. 195 (1925).

Cited in *In re LaFayette Bank & Trust Co.*, 198 N.C. 783, 153 S.E. 452 (1930).

§ 53-19. When Commissioner of Banks may take charge.

The Commissioner of Banks may forthwith take possession of the business and property of any bank to which this Chapter is applicable whenever it shall appear that such bank:

- (1) Has violated its charter or any laws applicable thereto;
- (2) Is conducting its business in an unauthorized or unsafe manner;
- (3) Is in an unsafe or unsound condition to transact its business;
- (4) Has an impairment of its capital stock;
- (5) Has refused to pay its depositors in accordance with the terms on which such deposits were received, or has refused to pay its holders of certificates of indebtedness or investment in accordance with the terms upon which such certificates of indebtedness or investment were sold;
- (6) Has become otherwise insolvent;
- (7) Has neglected or refused to comply with the terms of a duly issued lawful order of the Commissioner of Banks;
- (8) Has refused, upon proper demand, to submit its records, affairs, and concerns for inspection and examination of a duly appointed or authorized examiner of the Commissioner of Banks;
- (9) Its officers have refused to be examined upon oath regarding its affairs;
- (10) Has made a voluntary assignment of its assets to trustees.

Such banks may resume business as provided in G.S. 53-37. (1911, c. 25, s. 4; 1921, c. 4, s. 16; C.S., ss. 218(b), 242; 1931, c. 243, s. 5.)

Legal Periodicals. — For discussion of section, see 3 N.C.L. Rev. 79.

CASE NOTES

Bank presumed to Have Complied with Prerequisites before Resuming Operation.

— See *People's Bank v. Fidelity & Deposit Co.*, 4 F. Supp. 379 (M.D.N.C. 1933), *aff'd*, 72 F.2d 932 (4th Cir. 1934), *cert. denied*, 293 U.S. 627, 55 S. Ct. 348, 79 L. Ed. 714 (1935).

Disposition of Assigned Assets where Assignee Bank Becomes Insolvent.

— Where a bank assigned all its assets to another bank under an agreement, approved by the Commissioner of Banks, that the latter bank should pay all depositors and creditors of the former, but before the assignee bank had fully discharged the agreement it became insolvent

and was taken over by the Commissioner, upon a showing that the assets of the assignor bank are sufficient to pay in full all its depositors and creditors, the assignor bank and its depositors and creditors may restrain the Commissioner from taking possession of the assigned assets, and, pending the trial of the issue involving the value of the assigned assets, they may restrain the Commissioner from levying upon and collecting the statutory liability of the stockholders of the assignor bank. *Stanly Bank & Trust Co. v. Hood*, 206 N.C. 543, 174 S.E. 503 (1934).

§ 53-20. Liquidation of banks.

(a) When Commissioner of Banks to Take Possession. — Whenever any State bank shall neglect or refuse for a period of 60 days to make a report to the Commissioner of Banks, as he may demand, or shall, after demand under seal of the Commissioner of Banks, fail, neglect or refuse to comply with any of the rules, regulations or requirements of the State Banking Commission, or the provisions of the banking law, or if at any time the Commissioner of Banks shall find a bank subject to the supervision of the Commissioner of Banks, in an insolvent, unsafe or unsound condition to transact the business for which it was organized, or in an unsafe, or unsound condition to continue its business, or if such institution shall neglect or refuse to correct any irregularity which may be called to the attention of the president, cashier or board of directors, by the Commissioner of Banks, or any of his assistants, then, in either of such events, the Commissioner of Banks, or any duly authorized agent of the Commissioner of Banks appointed under seal of the Commissioner of Banks, shall forthwith take possession of such bank, and all of its assets and business and shall retain possession thereof until such bank shall be authorized by the Commissioner of Banks to resume business, or its affairs shall be fully liquidated as herein provided, or possession thereof shall have been surrendered under order of a judge of the superior court under the provisions of this section.

(b) Directors May Act. — Any bank may place its assets and business under the control of the Commissioner of Banks for liquidation by a resolution of a majority of its directors upon notice to the said Commissioner of Banks, and, upon taking possession of said bank, the Commissioner of Banks, or duly appointed agent, shall retain possession thereof until such bank shall be authorized by the Commissioner of Banks to resume business or until the affairs of said bank shall be fully liquidated as herein provided, and no bank shall make any general assignment for the benefit of its creditors save and except by surrendering possession of its assets to the Commissioner of Banks, as herein provided. Whenever any bank for any reason shall suspend operations for any length of time, said bank shall, immediately upon such suspension of operations, be deemed in the possession of the Commissioner of Banks and subject to liquidation hereunder.

(c) Notice of Seizure to Court Bar to Attachment, etc.; Transfers Void. — When the Commissioner of Banks, or duly appointed agent, shall take possession of any bank under subsections (a) or (b) hereof he shall, within 48

hours, file with the clerk of the superior court in the county where said bank is located, a notice of his action which shall state the reason therefor; and such notice shall be deemed the equivalent of a summons and complaint against said bank in an action in the superior court except that it shall not be necessary to make service thereof, and the taking possession of any bank shall thereupon date from the time when such authority was exercised and from and after such time all assets and property of such bank, of whatever nature shall be deemed to be in possession of the Commissioner of Banks, and the exercise of such authority shall operate as a bar to any attachment, or other legal proceeding, against such bank or its assets and, after such exercise of authority, no lien shall be acquired, in any manner binding or affecting any of the assets of such bank and every transfer or assignment made thereafter by such bank, or by its authority, of the whole or any part of its assets, shall be null and void; and the Commissioner of Banks shall be substituted in place of the bank in all actions in the State or federal courts, pending at the time of the exercise of such authority.

(d) Notice to Banks; Corporations and Persons Holding Assets; Liens Not to Accrue. — On taking possession of the assets and business of any bank, the Commissioner of Banks, or duly appointed agent, shall forthwith give notice, by mail or otherwise, of such action to all banks or other persons or corporations holding, or having in possession, any assets of such bank. No bank or other person or corporation shall have a lien or charge for any payment, advance or clearance made, or liability incurred against any of the assets of said bank after possession has been taken as provided under this section, except as hereinafter provided.

(e) Permission to Resume Business. — After the Commissioner of Banks has taken possession of any bank, such bank may resume business as provided in G.S. 53-37.

(f) Remedy by Bank for Seizure; Answer to Notice; Injunction, etc.; Appeal. — Whenever any bank, of whose assets and business the Commissioner of Banks has taken possession as aforesaid, except where possession is taken under subsection (b) hereof, shall deem itself aggrieved thereby, it may, at any time within 10 days after the filing of the notice with the clerk of the superior court, file an answer to said notice and may also upon notice to the Commissioner of Banks, apply to the resident or the presiding judge of the district for an injunction to enjoin further proceedings by the said Commissioner of Banks, and the said judge may cite the said Commissioner of Banks to show cause within 10 days thereafter why further proceedings should not be enjoined, and after hearing the allegations and proof of the parties with respect to the condition of said bank, may dismiss such application for injunction or may enjoin further proceedings under this section by the Commissioner of Banks. If the judge shall enjoin further action of the Commissioner of Banks and permit the reopening of the bank, he shall have authority to require of the bank such surety bond as he may deem necessary to insure its solvency, payable to the Commissioner of Banks for the sole benefit of the general creditors of the bank, and upon such terms as said judge may deem proper. Either party shall have the right to appeal to the Supreme Court as in other actions.

(g) Collection of Debts and Claims; Sale or Compromise of Debts and Claims; Commissioner Succeeds to All Property of Bank. — Upon taking possession of the assets and business of any bank by the Commissioner of Banks, the Commissioner of Banks, or the duly appointed agent, is authorized to collect all money due such bank, and to do such other acts as are necessary to conserve its assets and property, and shall proceed to liquidate the affairs thereof, as hereinafter provided. The Commissioner of Banks, or the duly appointed agent, shall collect all debts due and claims belonging to such bank, by suit, if necessary; and, by motion in the pending action, and upon authority of an order of the presiding or resident judge of the district may sell, compromise or com-

pound any bad or doubtful debt or claim, and may upon such order, sell the real and personal property of such bank on such terms as the order may provide or direct, except that, where the sale is made under power contained in any mortgage or lien bond or other paper wherein the title is retained for sale and the terms of sale set out, sale may be made under said authority.

Upon taking possession of any bank under this section, the Commissioner of Banks and/or the duly appointed agent shall have the possession and the right to the possession of all the property, assets, choses in action, rights and privileges of the said bank, including the right to resign the trust or exercise the power in all mortgages, deeds of trust, and all other papers executed to secure the payment of money in any form in which the said bank shall have been named as trustee and/or pledgee, and such property rights and privileges shall vest in the said Commissioner and/or duly appointed liquidating agent absolutely, for the purpose of liquidating, and sales and conveyance of the same, together with any and all other incidental rights, privileges, and powers necessary and convenient for the enjoyment of the right of conveyance and sale and for the exercise of the same. Upon the motion made, the bank or any person interested, may be heard, but the judge hearing the motion shall enter his order as in his discretion will best serve the parties interested. The powers granted by the second preceding sentence shall be in addition to and not in derogation of any existing acts ratified at the 1931 session of the General Assembly.

The officers and directors of any bank, or any bank that is in liquidation as provided by law, shall not hereafter exercise any powers herein declared to be vested in the North Carolina Commissioner of Banks, and/or the duly appointed liquidating agent.

(h) Bond of Commissioner of Banks; Surety; Condition; Minimum Penalty. — Upon taking possession of any bank, the Commissioner of Banks, or the duly appointed agent, shall execute and file a bond payable to the State of North Carolina, with some surety company as surety thereon, with the clerk of the superior court of the county where the bank is located, conditioned upon the faithful performance of all duties imposed by reason of the liquidation of such bank by the said Commissioner of Banks, or the duly appointed agent, or any agent or assistant assisting in the liquidation of the said bank, the penal sum of said bond to be fixed by order of the Commissioner of Banks, which in no case shall be less than five thousand dollars (\$5,000). Any person interested, by motion in the pending action, shall be heard by the resident or presiding judge as to the sufficiency of the bond; the judge hearing the motion may thereupon fix the bond; provided, that where such bank under this section is taken possession of by the Commissioner of Banks, he may, in his discretion with the approval of the State Banking Commission, appoint as his agent with the powers, duties and responsibilities of such agent under this section, the Federal Deposit Insurance Corporation or any corporation or agency established under and by virtue of the laws of the United States of America which is established for the purposes for which the said Federal Deposit Insurance Corporation was created under the Banking Act of 1933, enacted by Congress; and provided further that such appointment may be made when and only when the liabilities of such bank to its depositors are insured by said corporation or agency, either in whole or in part. In the event of such appointment such corporation or agency, with the approval of the Commissioner of Banks, may serve as such agent without giving the bond required under all other circumstances in this subsection.

(i) Inventory Necessary. — Within 30 days after the filing of the notice of the taking possession of any bank in the office of the clerk of the superior court, the Commissioner of Banks, or the duly appointed agent, shall make and state an inventory of the assets and liabilities of the said bank, and shall file one copy thereof with the clerk of the superior court in the pending action and shall keep

one copy on file in the said bank. Such inventory shall be open for inspection during the usual banking hours, provided, that nothing herein shall require said bank to remain open unnecessarily.

(j) Notice and Time for Filing Claims; Copies Mailed. — Notice shall be given by advertisement for four weeks in a newspaper published in said county; if no newspaper is published in said county, then in some newspaper having a general circulation in said county, calling on all persons who may have claims against the bank to present the same to the Commissioner of Banks at the office of the bank, and within the time to be specified in the notice, not less, however, than 90 days from the date of the first publication. A copy of this notice shall be mailed to all persons whose names appear as creditors upon the books of the bank. Affidavit by the Commissioner of Banks, or agent mailing the notice, to the effect that said notice was mailed shall be conclusive evidence thereof.

(k) Power to Reject Claims; Notice; Affidavit of Service; Action on Claim. — If the Commissioner of Banks, or the duly appointed agent, doubts the justice and validity of any claim or deposit, he may reject the same and serve notice of such rejection upon the claimant or depositor, either personally or by registered mail, and an affidavit of the service of such notice shall be filed in the office of the clerk of the superior court in the pending action, and shall be conclusive evidence of such notice. Any action or suit upon such claim so rejected must be brought by the claimant against the Commissioner of Banks in the proper court of the county in which the bank is located within 90 days after such service, or the same shall be barred. Objections to any claim or deposit not rejected by the Commissioner of Banks, or the duly appointed agent, may be made by any person interested by filing such objection in the pending action and by serving a copy thereof on the Commissioner of Banks, or duly appointed agent, and the Commissioner of Banks or duly appointed agent, after investigation, shall either allow such objection and reject the claim or deposit, or disallow the objection. If the objection is not allowed and the claim or deposit not rejected, the Commissioner of Banks or the duly appointed agent, shall file a notice to this effect in the pending action; and within 10 days thereafter, the person filing objection by motion in the pending action, a copy of which notice shall be served upon the person whose claim or deposit is objected to, may present to the court the question of the validity of said claim or deposit; and the questions of law and issues of fact shall thereupon be determined as in other civil actions.

(l) List of Claims Presented and Deposits; Copies; Proviso. — Upon the expiration of the time fixed for presentation of claims, the Commissioner of Banks, or the duly appointed agent, shall make a full and complete list of the claims presented and of the deposits as shown, including and specifying any claims or deposits which have been rejected by him, and shall file one copy in the office of the clerk of the superior court in the pending action, and shall keep one copy on file with the inventory in the office of the bank for examination. Any indebtedness against any bank which has been established or recognized as a valid liability of said bank before it went into liquidation, for which no claimant has filed claim, and/or any liability for which claim has been filed and disapproved, shall be listed in the office of the clerk of the superior court of the county in which the bank is located, by the liquidating agent, and the dividends accruing thereto shall be paid into the said office and shall be held for a period of three months after said liquidation is completed, and shall then be paid to the escheator of the State Treasurer. Any claim which may be presented after the expiration of the time fixed for the presentation of claims in the notice hereinbefore provided shall, if allowed, share pro rata in the distribution only of those assets of the bank in the hands of the Commissioner of Banks, and undistributed at the time the claim is presented: Provided, that when it is made to appear to the judge of the superior court, resident or presiding in the county,

that the claim could not have been filed within said period, said judge may permit those creditors or depositors who subsequently file their claim to share as other creditors.

(m) Declaration of Dividends; Order of Preference in Distribution. — At any time after the expiration of the date fixed by the Commissioner of Banks, or the duly appointed agent, for the presentation of claims against the bank, and from time to time thereafter, the Commissioner of Banks, out of the funds in his hands, after the payment of expenses and priorities, may declare and pay dividends to the depositors and other creditors of such bank in the order now or hereafter provided by law; and a dividend shall be declared when and as often as the funds on hand subject to the payment of dividends shall be sufficient to pay ten per centum (10%) of all claims entitled to share in such dividends. In paying dividends and calculating the same, all disputed claims and deposits shall be taken into account, but no dividend shall be paid upon such disputed claims and deposits until the same shall have been finally determined. The following shall be the order and preference in the distribution of the assets of any bank liquidated hereunder:

- (1) Taxes and fees due the Commissioner of Banks for examination or other services;
- (2) Wages and salaries due officers and employees of the bank, for a period of not more than four months;
- (3) Expenses of liquidation;
- (4) Certified checks and cashier's checks in the hands of a third party as a holder for value and the amounts due on collections made and unremitted for or for which final actual payment has not been made by the bank;
- (5) Amounts due creditors other than stockholders.

The word "asset" used herein shall not be deemed to include bailments or other property to which such bank has no title. Provided, that when any bank, or any officer, clerk, or agent thereof, receives by mail, express or otherwise, a check, bill of exchange, order to remit, note, or draft for collection, with request that remittance be made therefor, the charging of such item to the account of the drawer, acceptor, indorser, or maker thereof, or collecting any such item from any bank or other party, and failing to remit therefor, or the nonpayment of a check sent in payment therefor, shall create a lien in favor of the owner of such item on the assets of such bank making the collection, and shall attach from the date of the charge, entry or collection of any such funds. A statement of all dividends paid shall be filed in the office of the clerk of the superior court in the pending action, and said statements shall show the expenses deducted and the disputed claims and deposits considered in determining said dividend.

(n) Deposit of Funds Collected. — All funds collected by the Commissioner of Banks, in liquidating any bank, shall be deposited from time to time in such bank or banks as may be selected by him, and shall be subject to the check of the Commissioner of Banks. The payment of interest on the net average of such sums on deposit shall be controlled by the Governor and Council of State, who shall have full power and authority to determine for what periods of time payment of interest on such deposits shall or shall not be required, and to fix the rate of interest to be paid thereon.

(o) Employment of Local Attorneys; Expert Accountants and Other Experts; Compensation. — The Commissioner of Banks, for the purpose of liquidating banks as herein provided, shall employ such liquidating agents, competent local attorneys, accountants and clerks as may be necessary to properly liquidate and distribute the assets of said bank, and shall fix the compensation for all such agents, attorneys, accountants and clerks, and shall pay the same out of the funds derived from the liquidation of the assets of said bank: Provided, that all expenditure for the purpose herein provided shall be approved by the

resident or presiding judge in the pending action at such time as the same may be reported, and such charges shall be a proper charge and lien on the assets of such bank until paid.

(p) Unclaimed Dividends Held in Trust. — The unclaimed dividends remaining in the hands of the Commissioner of Banks for six months after the order for final distributions shall be held in trust for the several depositors and creditors of the liquidated bank; and the money so held by him shall be paid over to the persons respectively entitled thereto as and when satisfactory evidence of their right to the same is furnished. In case of doubtful or conflicting claims the Commissioner of Banks shall have authority to apply to the superior court of the county, by motion in the pending action, for an order from the resident or presiding judge of the superior court directing the payment of the moneys so claimed. When issues of fact are raised by said motion, the same may, upon request of any claimant, be submitted to the jury for determination as other issues of fact are determined. The interest earned on the unclaimed dividend so held shall be applied toward defraying the expenses incurred in the distribution of such unclaimed dividends. The balance of interest, if any, shall be deposited and held as other funds of the banking department to the credit of the Commissioner of Banks. After the Commissioner of Banks has held the unclaimed dividends held in trust by him under the provisions of this statute for the several depositors and creditors of the liquidated bank for a period of 10 years, he is hereby given the authority to pay the principal amount of such unclaimed dividends to the State Treasurer, to be held by the State Treasurer without liability for profit or interest until a just claim therefor shall be preferred by the parties entitled thereto. Upon payment of the said unclaimed dividends to the State Treasurer, the Commissioner of Banks shall be fully discharged from all further liability therefor.

(q) Report by Commissioner of Banks. — If the assets of any bank when fully collected by the Commissioner of Banks are not more than sufficient to pay the depositors and creditors of said bank, the Commissioner of Banks after he shall have fully distributed as herein provided the sums so collected, then he shall cause to be filed in the office of the clerk of the superior court in the pending action a full and complete report of all his transactions in said liquidation; and the filing of such report shall act as a full and complete discharge of the Commissioner of Banks from all further liabilities by reason of the liquidation of the bank.

(r) Action by Commissioner of Banks after Full Settlement. — Whenever the Commissioner of Banks shall have paid all the expenses of liquidation and shall have paid to each and every depositor and creditor of such bank, whose claims shall have been duly proven and allowed, the full amount of such claims, and shall have made proper provision for unclaimed and unpaid deposits and disputed claims and deposits, and shall have in hand other assets of said bank, he shall call a meeting of the stockholders of said bank by giving notice thereof by publication once a week for four weeks in a newspaper published in said county, or if no newspaper is published in said county, then in a newspaper having general circulation in said county, and by mailing a copy of such notice to each stockholder addressed to him at his address as the same shall appear upon the books of the bank. Affidavit of the officer mailing the notice herein required and of the printer as to the publication shall be conclusive evidence of notice hereunder. At such meeting any stockholders may be represented by proxy and the stockholders shall elect, by a majority vote of the stock present, an agent or agents who shall be authorized to receive from the Commissioner of Banks all the assets of said bank then remaining in his hands; and the Commissioner of Banks shall cause to be transferred and delivered to the said agent, or agents, all such assets of said bank. The Commissioner of Banks shall thereupon cause to be filed in the office of the clerk of the superior court in the pending actions a full and complete report of all his transactions, showing the

assets of said bank so transferred, together with the name of the agent or agents receipting for the same; and the filing of such report shall act as a full and complete discharge of the Commissioner of Banks from all further liabilities by reason of the liquidation of the bank. Such agent, or agents, shall convert the assets coming into his hands, or their hands, into cash, and shall make distribution to the stockholders of said bank as herein provided. Said agent, or agents, shall file semiannually a report of all transactions with the superior court of the county in which the bank is located, and with the Commissioner of Banks, and shall be allowed for such services such fees not in excess of five percent (5%), as may be fixed by the court. In case of death, removal or refusal to act, of any agent or agents elected by the stockholders, the Commissioner of Banks shall, upon report of such action on the part of such agent or agents to the superior court of the county in which the bank is located, turn over to said superior court for the stockholders of said bank, all the remaining assets of the bank, file his report and be discharged from any and all further liability to the stockholders as herein provided. Said assets, when turned over to the superior court hereunder, shall remain in the hands of the superior court until such time as, by order of court or by action of the stockholders, distribution shall be provided for.

(s) Annual Report of Commissioner of Banks; Items in Report of. — The Commissioner of Banks shall file, as a part of his annual report to the Governor, a list of the names of the banks so taken possession of and liquidated; and the Commissioner of Banks shall, from time to time, compile and make available for public inspection, reports showing the condition of each and all the banks so taken possession of; and the annual report of the Commissioner of Banks shall show the sum of unclaimed and unpaid deposits, with respect to each bank and shall show all depositories of all sums coming into the hands of the Commissioner of Banks under the provisions of this section.

(t) Compensation of Commissioner of Banks. — The Commissioner of Banks, for his services rendered in connection with the liquidation of banks hereunder, shall be entitled to actual expenses incurred in connection with the liquidation of each bank, including therein a reasonable sum for the time of the bank examiners and other agents of the Commissioner of Banks, which expenses shall be a prior lien on the assets of such bank so liquidated until paid in full; and the Commissioner of Banks shall have authority to prescribe reasonable rules and regulations for fixing such expenses.

(u) Exclusive Methods of Liquidation. — No bank created under the Banking Act or the Industrial Banking Act, and under the supervision of the Commissioner of Banks, shall be liquidated in any other way or manner than that provided herein.

(v) Application of Act. — The applicable provisions of this section as enacted by Chapter 113 of the Public Laws of 1927 shall apply to all banks which on March 7, 1927, have suspended operations or are in the process of liquidation but for which no permanent receiver has been appointed by the court.

(w) Liquidation by Commissioner of Banks of All Banks in Receivership Required. — On and after the first day of January, 1936, the provisions of this section shall apply to all banks included in the definition or classification of banking institutions under this Chapter, and/or any amendment thereto, which at said time shall be in receivership in the State courts; and the said banks shall be liquidated exclusively in accordance with the provisions of this section and by said Banking Commissioner. The liquidation of said banks shall be made strictly in accordance with the terms of this section and the words "competent local attorneys," as set forth in subsection (o) of this section shall be defined to be any attorney or attorneys resident of the county in which the bank is being liquidated.

(x) Unlocated Depositor. — Any funds due a known but unlocated person shall be disposed in accordance with Chapter 116B of the General Statutes,

except where the provisions of this Chapter specifically provide otherwise. (1921, c. 4, s. 17; C.S., s. 218(c); 1927, c. 113; 1931, c. 243, s. 5; cc. 385, 405; 1933, c. 175, s. 2, c. 546; 1935, c. 81, s. 4; c. 231, s. 1; c. 277; 1939, c. 91; 1947, c. 621, s. 1; 1971, c. 1135, s. 4; 1979, 2nd Sess., c. 1311, s. 4.)

Local Modification. — Buncombe: 1933, c. 27; Rutherford: 1933, c. 567.

Cross References. — As to conditions upon which closed banks may reopen, see § 53-37. As to escheats generally, see § 116B-1 et seq.

Effect of Amendments. — The 1979, 2nd Sess., amendment, effective January 1, 1981, added subsection (x).

Legal Periodicals. — For brief discussion of the 1947 amendment, which added the last two sentences to subsection (p), and other provisions relating to escheats, see 25 N.C.L. Rev. 421 and 26 N.C.L. Rev. 110.

For comment on escheat of intangible property, see 2 Wake Forest Intra. L. Rev. 100 (1966).

CASE NOTES

- I. General Consideration.
- II. What Constitutes Assets.
- III. Filing of Claims.
- IV. Distribution of Assets and Preferences.

I. GENERAL CONSIDERATION.

Bank taken over by the Commissioner continues as a legal entity. It is not dissolved and does not cease to exist, but its powers are exercised by the Commissioner for the purpose of converting the assets, paying its liabilities, and distributing the surplus, if any, among the stockholders. *People's Bank v. Fidelity & Deposit Co.*, 4 F. Supp. 379 (M.D.N.C. 1933), aff'd, 72 F.2d 932 (4th Cir. 1934), cert. denied, 293 U.S. 627, 55 S. Ct. 348, 79 L. Ed. 714 (1935).

Allowing Bank Officers to Continue Management Where Insolvency Imminent.

— Among other powers conferred by statute, the Corporation Commission (now Commissioner of Banks) may, without taking possession of the business and property of a State bank, upon its appearing to be in imminent danger of insolvency, direct upon what conditions its officers may continue in its management and control, and thus avoid losses to depositors, creditors, and stockholders, necessarily incident to the closing of its doors. *Taylor v. Everett*, 188 N.C. 247, 124 S.E. 316 (1924), cited in *People's Bank v. Fidelity & Deposit Co.*, 4 F. Supp. 379 (M.D.N.C. 1933), aff'd, 72 F.2d 932 (4th Cir. 1934), cert. denied, 293 U.S. 627, 55 S. Ct. 348, 79 L. Ed. 714 (1935).

Commissioner as Chancery Receiver. — The functions of the Commissioner of Banks are not limited to the provisions of this section, and the courts of equity have inherent power to permit him to exercise the functions of a chancery receiver in matters which are not inconsistent with his statutory duties. *Blades v. Hood*, 203 N.C. 56, 164 S.E. 828 (1932).

The Commissioner acts as a receiver under the inherent power of the court only in matters which are not provided for by statute, and his powers and duties in the collection and distribu-

tion of the assets of an insolvent bank are derived from the statute. *Hoft v. Mohn*, 215 N.C. 397, 2 S.E.2d 23 (1939).

Commissioner acts in a capacity equivalent to a receiver in taking over the assets of an insolvent bank, and in such capacity he represents the depositors and other creditors in the collection and distribution of the assets of the bank. *Hood v. North Carolina Bank & Trust Co.*, 209 N.C. 367, 184 S.E. 51 (1936).

Commissioner as Representative of Bank. — Although the ultimate purpose of the collection of assets is for the benefit of the creditors and others entitled to final distribution, and in this sense the Commissioner undoubtedly represents them, yet, in the collection of specific items of debt, in a more technical sense he must be held to represent the bank to whose rights and privileges he has succeeded and which he exercises. He can assert no greater right than that of the bank against any debtor, nor can he avoid any defense which might not be made against the bank. In this respect, he is pro hac vice the bank. The payment by him of a judgment against the bank, out of its funds, has the same effect as it would have had if paid by the bank, and an assignment to him has the force and effect of an assignment to the bank. *Hoft v. Mohn*, 215 N.C. 397, 2 S.E.2d 23 (1939).

Vesting of Title to Assets in Receiver. — Upon the appointment of a receiver under the statute, whether voluntary or by act of the Corporation Commission (now the Commissioner of Banks), the title to all the bank's assets vests in the receiver to be administered for the benefit of its depositors, etc., alike. *Douglass v. Dawson*, 190 N.C. 458, 130 S.E. 195 (1925).

Proceeds of Sale of Bank's Property Cannot Be Paid to New Bank. — The court

having jurisdiction is without power to authorize the sale of an insolvent bank's property under an agreement that the purchasers organize another bank and pay the purchase price to the newly-organized bank for distribution to the creditors and depositors, and thus relieve the Corporation Commission (now Commissioner of Banks) of its duty to collect and distribute the assets. *In re LaFayette Bank & Trust Co.*, 198 N.C. 783, 153 S.E. 452 (1930).

Section Does Not Affect Jurisdiction to Restrain Commissioner. — The jurisdiction of the superior courts of this State to restrain the Commissioner of Banks, is not affected by this section. The Commissioner is an administrative officer of the State, and in the performance of his duties as prescribed by statute, is subject to the jurisdiction of the superior courts, in the exercise of their equitable jurisdiction. *Stanly Bank & Trust Co. v. Hood*, 206 N.C. 543, 174 S.E. 503 (1934); *Hood v. Burrus*, 207 N.C. 560, 178 S.E. 362 (1935).

When the Commissioner is made a party, he succeeds to the rights of the bank in the litigation pending and comes into the pending case for the purpose of protecting the rights of creditors in the recovery, not for the purpose of asserting a new and independent cause of action. *Fidelity & Deposit Co. v. People's Bank*, 72 F.2d 932 (4th Cir. 1934), cert. denied, 293 U.S. 627, 55 S. Ct. 348, 79 L. Ed. 714 (1935).

No new cause of action is created where Commissioner is made a party to a previous action by the bank on its cashier's fidelity bond. See *People's Bank v. Fidelity & Deposit Co.*, 4 F. Supp. 379 (M.D.N.C. 1933), aff'd, 72 F.2d 932 (4th Cir. 1934), cert. denied, 293 U.S. 627, 55 S. Ct. 348, 79 L. Ed. 714 (1935).

Venue. — In determining residence for purposes of venue, the personal residence of the Commissioner of Banks controls, in the absence of statute. *Hartford Accident & Indem. Co. v. Hood*, 225 N.C. 361, 34 S.E.2d 204 (1945).

An action on a note by the Commissioner of Banks and the liquidating agent, etc., is properly brought in the county in which the insolvent bank is situate and of which the liquidating agent is a resident, and defendant's motion for change of venue to the county of their residence is properly refused. *Hood v. Progressive Stores*, 209 N.C. 36, 182 S.E. 694 (1935).

Action by Creditor Challenging Disposition of Assets. — A bank creditor may not maintain an action to interfere with the disposition of its assets by the Commissioner in the absence of any allegation of fraud, bad faith, or neglect on the part of the Commissioner, and a showing that a greater return would result from the disposition of the assets as contended for by the creditor. *In re Hood*, 208 N.C. 509, 181 S.E. 621 (1935).

Action to Recover for Wrongful Act of Officers and Directors. — Where the wrongful act of officers and directors is a breach of their duty to the bank, resulting in loss to the bank, the damages recoverable are assets of the bank. Upon its insolvency and upon the appointment of a receiver for the liquidation of the bank, such receiver, in the first instance, may alone maintain the action to recover the damages, as assets of the bank, to be administered by him for the benefit of all its depositors, creditors or stockholders. *Bane v. Powell*, 192 N.C. 387, 135 S.E. 118 (1926).

Order authorizing the Commissioner to sell a stock assessment judgment affected only the Commissioner and whoever purchased by virtue thereof, and so far as the stockholder against whom it was taken was concerned, the order was *res inter alios acta*. *In re Hood*, 208 N.C. 509, 181 S.E. 621 (1935).

Applied in *Dixie Mercerizing Co. v. Hood*, 207 N.C. 135, 176 S.E. 285 (1934); *Williams v. Hood*, 207 N.C. 737, 178 S.E. 669 (1935); *In re Champion Bank & Trust Co.*, 207 N.C. 802, 178 S.E. 555 (1935); *In re Hood*, 208 N.C. 509, 181 S.E. 621 (1935); *Hood v. Hewitt*, 209 N.C. 810, 185 S.E. 161 (1936).

Cited in *Underwood v. Hood*, 205 N.C. 399, 171 S.E. 364 (1933); *State v. Davidson*, 205 N.C. 735, 172 S.E. 489 (1934); *Pritchard v. Hood*, 205 N.C. 790, 172 S.E. 485 (1934); *Edgerton v. Hood*, 205 N.C. 816, 172 S.E. 481 (1934); *In re Central Bank & Trust Co.*, 205 N.C. 822, 172 S.E. 484 (1934); *In re Bank of Murphy*, 205 N.C. 840, 172 S.E. 181 (1934); *Hood v. Mitchell*, 206 N.C. 156, 173 S.E. 61 (1934); *Hood v. Johnson*, 208 N.C. 77, 178 S.E. 855 (1935); *Hood v. Elder Motor Co.*, 209 N.C. 303, 183 S.E. 529 (1936); *In re United Bank & Trust Co.*, 209 N.C. 389, 184 S.E. 64 (1936); *Hood v. Clark*, 211 N.C. 693, 191 S.E. 732 (1937); *Windley v. Lupton*, 212 N.C. 167, 193 S.E. 213 (1937); *Briley v. Crouch*, 115 F.2d 443 (4th Cir. 1940).

II. WHAT CONSTITUTES ASSETS.

"Assets" Defined. — The term "assets" is broad enough to cover anything available to pay the bank's creditors. *Hill v. Smathers*, 173 N.C. 642, 92 S.E. 607 (1917).

Right of Action against Officers and Directors as Asset. — The right of action by the receiver of an insolvent bank for loss or depreciation of the bank's assets, due to the willful or negligent failure of its officers and directors to perform their official duties, is one enforceable for the benefit of the bank as well as for its creditors, and such liability of the officers and directors is an asset of the bank. *Corporation Comm'n v. Merchants Bank & Trust Co.*, 193 N.C. 113, 136 S.E. 362 (1927).

Recoverable Damages as Assets. — Where the wrongful act of officers and directors is a breach of their duty to the bank, resulting

in loss to the bank, the damages recoverable are assets of the bank. *Bane v. Powell*, 192 N.C. 387, 135 S.E. 118 (1926).

III. FILING OF CLAIMS.

When Claim Not Barred by Elapsing of 90-Day Period. — In an action against the statutory receiver of an insolvent bank to recover bonds held by the bank for safekeeping, where the agent of the receiver advised plaintiffs that no claim was necessary for the bonds, and the defendant (receiver) contended that, under this section, the claim was barred for failure to bring suit within 90 days after the time designated for presenting claims, or in 90 days after the claim was presented and disallowed upon notice to plaintiffs, plaintiffs were not "creditors" or "claimants" within the meaning of this section and therefore it was not applicable to the action, and further, even conceding it was applicable, it would be inequitable and unconscionable for defendant to be allowed to set same up as a defense. *Bright v. Hood*, 214 N.C. 410, 199 S.E. 630 (1938).

IV. DISTRIBUTION OF ASSETS AND PREFERENCES.

Taxes on Bank Property Constitute Preferred Claim. — Where a bank, owning the land upon which the bank building was situate, closed its doors and the Commissioner of Banks took possession for purposes of liquidation and at the time of closing there was an outstanding mortgage, all of which was unpaid and in default and county and town taxes were duly assessed and subsequently the mortgagee duly exercised the power of sale and became the purchaser of the property, the bank, the mortgagor, was the real owner and it was liable for taxes unpaid at the time of the sale. Such taxes constitute a preferred claim against the assets of the insolvent bank. *Hood v. McGill*, 206 N.C. 83, 173 S.E. 20 (1934).

Purchaser of Bank Draft or Check Not Entitled to Preference. — The purchase of a bank draft, a cashier's check, or a certified check creates the relation of debtor and creditor between the bank and the purchaser, and the purchaser is not entitled to a preference over other general creditors of the bank from which it was purchased. *Great Atl. & Pac. Tea Co. v. Hood*, 205 N.C. 313, 171 S.E. 344 (1933).

If a depositor in a bank takes a cashier's check for his deposit, and thereafter surrenders the cashier's check, purchasing with the proceeds a draft for the purchase price of certain bonds, and the bank is closed before the draft is paid, such transaction does not constitute a preference as defined by this section. *In re Bank of Pender*, 204 N.C. 143, 167 S.E. 561 (1933).

No Preference to Check or Draft on Another Bank. — Where a check was purchased from a bank, which a few days later became

insolvent and the bank on which the check was drawn refused to honor it, the purchaser could not claim a preference under this section. *Great Atl. & Pac. Tea Co. v. Hood*, 205 N.C. 313, 171 S.E. 344 (1933).

Nor Where Draft Sent to Drawee Bank for Collection Not Charged to Drawer's Account. — Where a depositor drew a draft on his local bank against a general deposit and the payee forwarded the draft to the drawee bank for collection and it was returned with notice of the bank's insolvency, it was held that the drawer's claim was not entitled to a statutory preference under this section for the reason that the bank did not charge the draft to the account of the drawer; and if the bank's failure to return the draft within 24 hours after its receipt by mail implied an acceptance under the provisions of former §§ 25-143 and 25-144, such acceptance did not ipso facto create a preference. *Lamb v. Hood*, 205 N.C. 409, 171 S.E. 359 (1933).

Nor Where Cashier's Check Issued but Proceeds Not Yet Remitted. — Where a bank debits an account with the amount of a check drawn by the depositor and issues its cashier's check for the amount but the bank is placed in a receiver's hands before remitting the proceeds to a third person, as instructed to do by the depositor, the cashier's check does not constitute a preference as defined by this section. *Board of Educ. v. Hood*, 204 N.C. 353, 168 S.E. 522 (1933).

No Preference in Assets of Failed Collecting Bank. — Where a certificate of deposit sent by an insurance company to a national bank for collection was used in clearance, a draft for the balance on the clearance transaction being received by the bank and its draft being sent to the company for the amount collected on the certificate; and the clearance draft not being paid, the collecting bank stopped payment on its draft and subsequently became insolvent, as did the other bank to the clearance transaction; and the collecting bank's receiver filed claim with the receiver of the other bank for the amount of the clearance draft, which was paid in full as a preferred claim under subsection (m) of this section; a debtor and creditor relationship in regard to the certificate arose between the insurance company and the collecting bank, and the company's successor was not entitled to a preference in the distribution of the collecting bank's assets. *Citizens Nat'l Bank v. Fidelity & Cas. Co.*, 86 F.2d 4 (4th Cir. 1936), cert. denied, 299 U.S. 612, 57 S. Ct. 315, 81 L. Ed. 452 (1937).

Words "or otherwise" in the proviso in subsection (m) of this section, are to be construed in connection with the other parts of subsection (m), meaning any mode of transportation analogous to those specified in subsection (m), requiring "remitting" or "sending" the

money to the payee of the check. *Morecock v. Hood*, 202 N.C. 321, 162 S.E. 730 (1932).

Lien under Subsection (m) . Not Applicable to Solvent Banks. — The proviso of subsection (m) of this section, relating to lien for amount of check, etc., collected and not remitted for, was not intended to apply to solvent banks. *Spradlin v. Royal Mfg. Co.*, 73 F.2d 776 (4th Cir. 1934).

Nor to National Banks. — The proviso in subsection (m) of this section relating to the distribution of the assets of insolvent banks has no application to the assets of national banks. The National Banking Act provides how the assets of insolvent national banks shall be distributed, and state statutes cannot affect this distribution. *Spradlin v. Royal Mfg. Co.*, 73 F.2d 776 (4th Cir. 1934).

Where a national bank received a draft for collection and remitted therefor a draft drawn on one of its correspondents, but failed before

this draft could be paid, the owner of the draft collected had no lien on the assets of the insolvent bank in the hands of the receiver. There was no augmentation of the assets of the bank as a result of the collection, but merely a shifting of credits, and consequently no basis for the declaration of a tract. *Spradlin v. Royal Mfg. Co.*, 73 F.2d 776 (4th Cir. 1934).

Check Presented over Counter Not within Proviso. — Where a depositor presented his check for payment over the counter of a bank, which charged his account with the amount thereof and gave him a draft drawn on another bank, which was returned unpaid, he was not entitled to a preference in the assets of the bank drawing the draft, the transaction not coming within the proviso in subsection (m), as the check was not received by mail, express, or otherwise. *Morecock v. Hood*, 202 N.C. 321, 162 S.E. 730 (1932).

§ 53-21. Sale of stocks of defunct banks validated.

All private sales of stocks in resident corporations, joint stock companies and limited partnerships, made prior to March 20, 1935, by the Commissioner of Banks or a duly appointed agent in the course of the liquidation of a defunct bank, where such sale was made by and with the approval of a liquidation board duly selected by the creditors and stockholders of such bank and upon authority of an order of the presiding or resident judge of the district in which the principal office of such bank was located, are hereby in all respects validated, ratified and confirmed. (1935, c. 113.)

§ 53-22. Statute relating to receivers applicable to insolvent banks.

The provisions of G.S. 1-507.1 through 1-507.11, both inclusive, relating to receivers, when not inconsistent with the provisions of G.S. 53-20, shall apply to liquidation of insolvent banks. (1921, c. 4, s. 19; 1923, c. 148, s. 4; C.S., s. 218(e); 1931, c. 215; 1955, c. 1371, s. 4.)

CASE NOTES

Cited in *Douglass v. Dawson*, 190 N.C. 458, 56, 164 S.E. 828 (1932); *Hoft v. Mohn*, 215 N.C. 130 S.E. 195 (1925); *Blades v. Hood*, 203 N.C. 397, 2 S.E.2d 23 (1939).

§ 53-23. Disposition of books, records, etc.

All books, papers, and records of a bank which has been finally liquidated shall be deposited by the receiver in the office of the clerk of the superior court for the county in which the office of such bank is located, or in such other place as in his judgment will provide for the proper safekeeping and protection of such books, papers, and records. The books, papers, and records herein referred to shall be held subject to the orders of the Commissioner of Banks and the clerk of the superior court for the county in which such bank was located. (1921, c. 4, s. 20; C.S., s. 218(f); 1931, c. 243, s. 5.)

§ 53-24. Destruction of records of liquidated insolvent banks.

After the expiration of 10 years from the date of filing in the office of the clerk of the superior court of a final order approving the liquidation by the banking department of any insolvent bank and the delivery to the clerk or into his custody of the records of such bank, the said records may be destroyed by the clerk of the superior court holding said records by burning the same in the presence of the register of deeds and the sheriff of said county, who shall join with the clerk in the execution of a certificate as to the destruction of said records. The certificate shall be filed by the clerk in the court records of the liquidation of the bank whose records are thus destroyed.

After 10 years from the filing by the Commissioner of Banks of a final report of liquidation of any insolvent bank, the said Commissioner, by and with the consent of the State Banking Commission or its successor, may destroy by burning the records of any insolvent bank held in the Department of the Commissioner of Banks in connection with the liquidation of such bank: Provided, that in connection with any unpaid dividends the Commissioner of Banks shall preserve the deposit ledger or other evidence of indebtedness of the bank with reference to the unpaid dividend until the dividend shall have been paid.

Nothing in this section shall be construed to authorize the destruction by the clerk of the superior court of any county or by the Commissioner of Banks of any of the formal records of liquidation, nor shall the Commissioner of Banks have authority under this section to destroy any of the records made in his office with reference to the liquidation of any insolvent bank. (1939, c. 91, s. 1; c. 135.)

§ 53-25. Trust terminated on insolvency of trustee bank.

Whenever any bank or trust company created under the laws of this State, which has heretofore been, or shall hereafter be, appointed trustee in any indenture, deed of trust or other instrument of like character, executed to secure the payment of any bonds, notes or other evidences of indebtedness, has been or shall be by reason of insolvency, or for any other cause provided by law, taken over for liquidation by the Commissioner of Banks of this State or by any other legally constituted authority, the powers and duties of such bank or trust company as trustee in any such instrument shall, upon the entry of an order of the clerk of the superior court appointing a successor trustee, upon a petition as hereinafter provided, immediately cease and determine. (1931, c. 250, s. 1.)

§ 53-26. Petition for new trustee; service upon parties interested.

In all cases of such insolvency and liquidation mentioned in G.S. 53-25, the clerk of the superior court of any county in which such indenture, deed of trust or other instrument of like character is recorded shall, upon the verified petition of any person interested in any such trust, either as trustee, beneficiary or otherwise, which interest shall be set out in said petition, enter an order directing service on all interested parties either personally or by the publication in some newspaper published in the county, or in some adjoining county if no newspaper is published in the county where such application is made, of a notice directed to all persons concerned, commanding and requiring all persons having any interest in said trust, to be and appear at his office at a day designated in said order and notice, not less than 30 days from the date thereof, and show cause why a new trustee shall not be appointed. (1931, c. 250, s. 2.)

§ 53-27. Publication and contents of notice.

Such notice shall be published in the manner required by law for service of summons by publication, and shall set forth the names of the parties to the indenture, deed of trust or other such instrument, the date thereof, and the place or places where the same is recorded. (1931, c. 250, s. 3.)

§ 53-28. Appointment where no objection made.

If, upon the day fixed in said notice, no person shall appear and object to the appointment of a substitute trustee, the clerk shall, upon such terms as he deems advisable to the best interest of all parties, appoint some competent person, or corporation authorized to act as such, substitute trustee, who shall be vested with and shall exercise all the powers conferred upon the trustee named in said instrument. (1931, c. 250, s. 4.)

§ 53-29. Hearing where objection made; appeal from order.

If objection shall be made to the appointment of a new trustee, the clerk shall hear and determine the matter, and from his decision an appeal may be prosecuted as in case of special proceedings generally. (1931, c. 250, s. 5.)

§ 53-30. Registration of final order.

The final order of appointment of such new trustees shall be certified by the clerk of the superior court in which such order is entered and shall be recorded in the office of the register of deeds in the county or counties in which the instrument under which such appointment has been made is recorded, and a minute of the same shall be entered by the register of deeds on the margin of the record where said original instrument is recorded. (1931, c. 250, s. 6.)

§ 53-31. Petition and order applicable to all instruments involved.

The petition and the order appointing such new trustee may include and relate and apply to any number of indentures, deeds of trust or other instruments, wherein the same trustee is named. (1931, c. 250, s. 7.)

§ 53-32. Additional remedy.

Sections 53-25 to 53-31 shall be in addition to and not in substitution for any other remedy provided by law. (1931, c. 250, s. 8.)

Legal Periodicals. — For discussion of this section and other remedies, see 9 N.C.L. Rev. 403.

§ 53-33. Validation of acts of officers of insolvent banks as trustees in deeds of trust.

Whenever any State bank, prior to January 1, 1931, shall have become insolvent and its assets and business been placed in the hands of the Commissioner of Banks or taken control of by the Commissioner of Banks for liquidation, and the board of directors of said bank shall have thereafter by resolution authorized or directed the officers of said bank or some of them to perform or exercise in the name of the bank as trustee any power or duty of such bank as

trustee under any deed in trust to it recorded in any county in this State, provided said resolution was passed prior to the eleventh day of May, 1931, the performance or exercise of any such power or duty heretofore or hereafter by any officer or officers so authorized shall be effective and binding on all parties concerned as the act of such bank as trustee as aforesaid, to the same extent and in the same manner as if such bank had not become insolvent and its assets and business had not been placed in the hands of the Commissioner of Banks or taken control of by the Commissioner of Banks for liquidation. (1931, c. 403.)

Editor's Note. — Pursuant to Session Laws 1931, c. 243, s. 5, "Commissioner of Banks" has been substituted for "Corporation Commission" in four places. See § 53-92.

§ 53-34. Validation of sales by Commissioner of Banks under mortgages, etc., giving banks power of sale.

Whenever it appears that either the Commissioner of Banks or any liquidating agent appointed pursuant to the provisions of G.S. 53-20, has undertaken to exercise the power of sale set up in any mortgage, deed of trust, or other written instrument for the security of the payment of money in which any bank then in liquidation was named trustee, the said acts including the acts of resigning the trust, of the Commissioner of Banks and/or liquidating agent appointed as aforesaid, are hereby validated and declared to be of the same force and effect as if done by the bank named as trustee in the mortgage, deed of trust, or other instrument. (1931, c. 132.)

Editor's Note. — This section appears to have been intended to overcome the effect of *Mitchell v. Shuford*, 200 N.C. 321, 156 S.E. 513 (1931). In view, however, of this case, and of *Booth v. Hairston*, 193 N.C. 278, 136 S.E. 879 (1927), rehearing denied, 195 N.C. 8, 141 S.E. 480 (1928), doubt has been cast upon the constitutionality of the validating act. It is believed, however, that the facts of the situation aimed at by the validating act can be distinguished. The future police policy stated in

§ 53-25 et seq., and in the 1931 amendment to § 53-20, subsection (g).

Pursuant to Session Laws 1931, c. 243, s. 5, "Commissioner of Banks" has been substituted for "North Carolina Corporation Commission, the chief State bank examiner" and for "North Carolina Corporation Commission and/or chief State bank examiner." See § 53-92.

Legal Periodicals. — For discussion of section, see 9 N.C.L. Rev. 401.

§ 53-35. Foreclosures and execution of deeds by Commissioner of Banks validated.

Whereas, the Commissioner of Banks, created by Chapter 243 of the Public Laws of 1931, was given general supervision over the banks of this State; and

Whereas, the Commissioner of Banks, under authority of Chapter 385 of the Public Laws of 1931, succeeded to all the property of banks in liquidation, including fiduciary powers under the mortgages and deeds of trust; and

Whereas, the Commissioner of Banks, in his own name and in the name of a number of conservators or liquidating agents of banks in the process of liquidation under his supervision, has foreclosed a large number of deeds of trust in which such banks were the named trustee, and has executed under the powers contained therein a large number of trustee's deeds under authority thereof: Now, therefore, all the deeds and acts of the Commissioner of Banks and/or conservators or liquidating agents of such banks in the process of liq-

liquidation, as in the preamble to this section described, are hereby in all respects ratified, validated and confirmed.

This section shall not affect litigation pending April 3, 1939. (1939, c. 368.)

§ 53-36. Commissioner to report to Secretary of State certain matters relative to liquidation of closed banks; publication.

The Commissioner of Banks of the State of North Carolina shall on or before the first day of June, 1933, and on the first day of January and July of each year thereafter file with the Secretary of the State of North Carolina a report showing all banks under liquidation in the State of North Carolina, and the names of any and all auditors together with the amounts paid to them for auditing each of said banks, and the names of any and all attorneys employed in connection with the liquidation of said banks together with the amount paid or contracted to be paid to each of said attorneys. If any attorney has been employed on a fee contingent upon recovery said report must state in substance the contract.

Within five days from the receipt of said report the Secretary of the State of North Carolina shall cause same to be published one time in some newspaper published in each county in which a bank or banks are under liquidation, if there be a newspaper published in said county. If not, the Secretary of the State of North Carolina shall cause a copy of said report to be posted at the courthouse door in said county. (1933, c. 483.)

ARTICLE 4.

Reopening of Closed Banks.

§ 53-37. Conditions under which banks may reopen.

Whenever the Commissioner of Banks has taken in possession any bank, such bank may, with the consent of the Commissioner of Banks, resume business upon such terms and conditions as may be approved by the State Banking Commission. When such banks have been taken in possession under the provisions of G.S. 53-20, subsections (a) or (b), such conditions shall be fully stated in writing and a copy thereof shall be filed with the clerk of the superior court in the action required to be commenced in such cases against said bank under the provisions of G.S. 53-20, subsection (c): Provided, however, no bank or banking institution which has been taken in possession by the Commissioner of Banks under the provisions of the State banking laws shall be reopened to receive deposits or for the transaction of a banking business unless and until:

- (1) The bank has been completely restored to solvency;
- (2) The capital stock, if impaired, has been entirely restored in cash;
- (3) It shall clearly appear to the Commissioner of Banks that such bank may be reopened with safety to the public and such reopening is necessary to serve the business interests of the community. (1921, c. 4, s. 16; C.S., s. 218(q); 1927, c. 113, s. 1; 1931, c. 243, s. 5; c. 388, s. 1; 1939, c. 91, s. 2.)

§ 53-38. Certain contracts not affected.

Nothing in G.S. 53-37 shall impair or affect any contracts made by banks and depositors of banks reopened prior to May 12, 1931, under the permission of the State Banking Department. (1931, c. 388, s. 4.)

Cross References. — As to liquidation, see § 53-20. As to when Commissioner may take charge, see § 53-19.

CASE NOTES

Applied in *Taylor v. Everett*, 188 N.C. 247, 124 S.E. 316 (1924).

ARTICLE 5.

Stockholders.

§ 53-39. New State banks to set up surplus fund.

The common stockholders of any bank organized after March 17, 1933, under the laws of the State of North Carolina shall pay in, in cash, a surplus fund equal to fifty per centum (50%) of its common capital stock before the bank shall be authorized to commence business. (1933, c. 159, s. 2; 1935, c. 79, s. 1.)

Legal Periodicals. — For discussion of this section, see 11 N.C.L. Rev. 200 and 13 N.C.L. Rev. 91.

§ 53-40. Executors, trustees, etc., not personally liable.

Persons holding stock as executors, administrators, guardians, or trustees shall not personally be subject to any liabilities as stockholders, but the estate and funds in their hands shall be liable in like manner and to the same extent as the testator, intestate, ward, or person interested in such trust fund would be if living and competent to hold stock in his own name. (1921, c. 4, s. 23; C.S., s. 219(c).)

CASE NOTES

This section extends to every trust relation, however created, and attaches liability to the estate and funds in the hands of the trustee. *Hood v. North Carolina Bank & Trust Co.*, 209 N.C. 367, 184 S.E. 51 (1936).

Exemption Limited to Express and Active Trusts. — This section refers not only to trustees appointed by will, or by order of a court or of a judge, but to any trust relation, however created. But the exemption is limited to cases of express and active trusts, where there is a probability of some estate to respond to the liability. *American Trust Co. v. Jenkins*, 193 N.C. 761, 138 S.E. 139 (1927).

Former Statutory Liability of Stockholders Abolished. — Public Laws 1935, c. 99, amending C. S. § 219(a), abolished the former statutory liability of stockholders in the banks of this State. *Fidelity Sec. Co. v. Hight*, 211 N.C. 117, 189 S.E. 174 (1937); *Hood v. Richardson Realty*, 211 N.C. 582, 191 S.E. 410 (1937).

Liability of Bank Trustee to Trust Estate Cannot Be Set Off against Liability of Estate. — The liability of a bank trustee to the trust estate for its negligence could not be set up as a counterclaim or setoff against the former statutory liability (abolished by Public Laws 1935, c. 99) of the estate upon the insolvency of the bank. *In re United Bank & Trust Co.*, 209 N.C. 389, 184 S.E. 64 (1936).

Assignee of Judgment against Executor as Such Not Entitled to Set Up Personal Liability of Executor. — The assignment of a judgment against an executor in his representative capacity for a stock assessment made on shares of stock of a bank in liquidation transfers only the rights of the assignor of the judgment in his status of judgment creditor and not his personal rights not incident to such status. The assignee is not entitled to set up the personal liability of the executor. *Jones v. Franklin's Estate*, 209 N.C. 585, 183 S.E. 732 (1936).

§ 53-41. Stock sold if subscription unpaid.

Whenever any stockholder, or his assignee, fails to pay any installment on the stock, when the same is required by law to be paid, the directors of the bank shall sell the stock of such delinquent stockholder at public or private sale, as they may deem best, having first given the delinquent stockholder 20 days' notice, personally or by mail, at his last known address. If no party can be found who will pay for such stock the amount due thereon to the bank with any additional indebtedness of such stockholder to the bank, the amount previously paid shall be forfeited to the bank, and such stock shall be sold, as the directors may order, within 30 days of the time of such forfeiture, and if not sold, it shall be canceled and deducted from the capital stock of the bank. (1921, c. 4, s. 25; C.S., s. 219(e).)

§ 53-42. Impairment of capital; assessments, etc.

The Commissioner of Banks shall notify every bank whose capital shall have become impaired from losses or any other cause, and the surplus and undivided profits of such bank are insufficient to make good such impairment, to make the impairment good within 60 days of such notice by an assessment upon the stockholders thereof, and it shall be the duty of the officers and directors of the bank receiving such notice to immediately call a special meeting of the stockholders for the purpose of making an assessment upon its stockholders sufficient to cover the impairment of the capital, payable in cash, at which meeting such assessment shall be made: Provided, that such bank may reduce its capital to the extent of the impairment, as provided in G.S. 53-11. If any stockholder of such bank neglects or refuses to pay such assessment as herein provided, it shall be the duty of the board of directors to cause a sufficient amount of the capital stock of such stockholder or stockholders to be sold at public auction, upon 30 days' notice given by posting such notice of sale in the office of the bank and by publishing such notice in a newspaper in the place where the bank is located, and if none therein, a newspaper circulating in the county in which the bank is located, to make good the deficiency, and the balance, if any, shall be returned to the delinquent shareholder or shareholders. If any such bank shall fail to cause to be paid in such deficiency in its capital stock for three months after receiving such notice from the Commissioner of Banks, the Commissioner of Banks may forthwith take possession of the property and business of such bank until its affairs be finally liquidated as provided by law. A sale of stock, as provided in this section, shall effect an absolute cancellation of the outstanding certificate or certificates evidencing the stock so sold, and shall make the certificate null and void, and a new certificate shall be issued by the bank to the purchaser of such stock. (Ex. Sess. 1921, c. 56, s. 3; C.S., s. 219(f); 1925, c. 117; 1931, c. 243, s. 5; 1959, c. 157.)

Cross References. — As to the amount of reserve required, see §§ 53-50 and 53-51.

CASE NOTES

Similarity to Former Federal Act. — This section is substantially similar to the former Nationally Banking Act, 6 Federal Statutes Annotated § 5205, which was designed principally for the purpose of strengthening banks whose capital has become impaired. *Elon Banking & Trust Co. v. Burke*, 189 N.C. 69, 126 S.E. 163 (1925).

"Payable in Cash" Construed. — The expression "payable in cash" merely means that the account is presently due, and its payment may be presently enforced, but only by the methods the statute specifies. *Elon Banking & Trust Co. v. Burke*, 189 N.C. 69, 126 S.E. 163 (1925).

Retroactive Application of Provisions for Assessment Against Stockholders is Unconstitutional. — The act of 1925, amending this section by providing for personal liability of stockholders for the amount by which the sale of their stock failed to realize a sum sufficient to pay the assessment, provided a new remedy, and to permit the bank to main-

tain the action against a stockholder who purchased his stock prior to the enactment of the amendment of 1925 would violate due process of law, and would impair the obligations of the contract, and hence the act of 1925 cannot be given retroactive effect. *Bank of Pinehurst v. Derby*, 218 N.C. 653, 12 S.E.2d 260 (1940).

§ 53-42.1. Change in bank control or management.

- (a) (1) No person shall acquire voting stock of any bank or bank holding company, as defined in section 2 of the Bank Holding Company Act of 1956 as amended, which will result in a change in the control of the bank or bank holding company unless the Commissioner of Banks shall have approved the proposed acquisition.
- (2) Written application for the proposed change in control of a bank or bank holding company must be filed with the Commissioner of Banks in such form as he may prescribe and contain such information as he may require at least 60 days prior to effective date of the proposed acquisition. The Commissioner of Banks shall approve the proposed change of control, unless upon examination and investigation he finds that
 - a. The character, competence, general fitness, experience or integrity of any acquiring person or of any of the proposed management personnel shows that it would not be in the interest of the depositors of the bank, or in the interest of the public to permit such person to control the bank or bank holding company; or
 - b. The financial condition of any acquiring person is such as might jeopardize the financial stability of the bank or bank holding company or prejudice the interests of the depositors of the bank.

All information contained in any application or report filed under this section and all information produced by examination and investigation of any application or report by the Commissioner of Banks shall be confidential and not available for public inspection.

- (3) The provisions of this subsection shall not apply to the following transactions:
 - a. The acquisition of bank shares or assets which is subject to approval under section 3 of the Bank Holding Company Act as amended (12 U.S.C. 1842);
 - b. The acquisition of shares of a bank holding company as defined by section 2 of the Bank Holding Company Act as amended (12 U.S.C. 1841) which bank holding company has a national bank as its principal banking subsidiary;
 - c. The acquisition of shares in connection with securing, collecting, or satisfying a debt previously contracted in good faith;
 - d. The acquisition of shares by will or through intestate succession; and
 - e. The acquisition of shares by gift, unless such gift is made for the purpose of circumventing this section.

In the event of an acquisition of shares which is exempted by c, d, or e above, the person acquiring the shares shall report the transaction to the Commissioner of Banks within 30 days after the acquisition. The report shall contain such information and be in such form as the Commissioner shall request and prescribe.

- (4) As used in this section the following terms shall have the following meanings:

- a. "Control" means the possession, directly or indirectly, of the power to direct or cause the direction of the management and policy of the bank or bank holding company, or ownership of as much as ten percent (10%) of the outstanding voting stock in a bank or bank holding company; and
- b. "Person" means an individual or a corporation, partnership, trust, association, joint venture, pool, syndicate, sole proprietorship, unincorporated organization or any other form of entity not specifically listed herein.

(b) Whenever a loan or loans are made by a bank, which loan or loans are, or are to be, secured by ten percent (10%) or more of the voting stock of a bank, the president or other chief executive officer of the bank which makes the loan or loans shall report such fact to the Commissioner of Banks within 24 hours after obtaining knowledge of such loan or loans, except when the borrower has been the owner of record of the stock for a period of one year or more, or the stock is of a newly organized bank prior to its opening. The report shall show the identity of borrower, the name of the bank issuing the stock securing the loan, the number of shares securing the loan and the amount of the loan or loans, and this report shall be in addition to any report that may be required pursuant to other provisions of law.

(c) Repealed by Session Laws 1981, c. 671, s. 6, effective July 1, 1981.

(d) Each bank shall report to the Commissioner of Banks within 24 hours any changes in chief executive officers or directors, including in its report a statement of the past and current business and professional affiliations of new chief executive officers or directors. (1967, c. 789, s. 5; 1981, c. 671, ss. 3-6.)

Effect of Amendments. — The 1981 amendment, effective July 1, 1981, rewrote subsection (a), added the second sentence of subsection (b),

and deleted subsection (c), relating to information to be contained in the reports required by subsection (a) and (b).

ARTICLE 6.

Powers and Duties.

§ 53-43. General powers.

In addition to the powers conferred by law upon private corporations, banks shall have the power:

- (1) To exercise by its board of directors, or duly authorized officers and agents, subject to law, all such powers as shall be necessary to carry on the business of banking, by discounting and negotiating promissory notes, drafts, bills of exchange, and other evidences of indebtedness, by receiving deposits, by buying and selling exchange, coin, and bullion, and by loaning money on personal security or real and personal property. Such corporation at the time of making loans may not take and receive interest or discounts in advance where the effective rates of interest or discounts collected shall exceed the maximum rates of interest provided under this section, G.S. 24-1.1 and 24-1.2 if such interest or discount had not been collected in advance.
- (2) To adopt regulations for the government of the corporation not inconsistent with the Constitution and laws of this State.
- (3) To purchase, hold, and convey real estate for the following purposes:
 - a. Such as shall be necessary for the convenient transaction of its business, including furniture and fixtures, with its banking offices and other spaces to rent as a source of income, which investment shall not exceed fifty percent (50%) of its unimpaired

capital fund: Provided, that this fifty percent (50%) limitation shall not apply to banking houses, furniture and fixtures leased for the purposes set forth in this subdivision. Provided, further, that if any bank shall demonstrate to the satisfaction of the Commissioner of Banks that an investment of more than fifty percent (50%) of its unimpaired capital fund in its banking houses, furniture and fixtures, would promote the convenience of the general public in transacting its banking business and would not adversely affect the financial stability of the bank, the Commissioner of Banks may, in his discretion, authorize any bank to invest more than fifty percent (50%) of its unimpaired capital fund in its banking houses, furniture and fixtures.

- b. Such as is mortgaged to it in good faith by way of security for loans made or moneys due to such banks.
 - c. Such as has been purchased at sales upon foreclosures of mortgages and deeds of trust held or owned by it, or on judgments or decrees obtained and rendered for debts due to it, or in settlements affecting security of such debts. All real property referred to in this subdivision shall be sold by such bank within one year after it is acquired unless, upon application by the board of directors, the Commissioner of Banks extends the time within which such sale shall be made. Any and all powers and privileges heretofore granted and given to any person, firm, or corporation doing a banking business in connection with a fiduciary and insurance business, or the right to deal to any extent in real estate, inconsistent with this Chapter, are hereby repealed.
- (4) Nothing contained in this section shall be deemed to authorize banking corporations to engage in the business of dealing in investment securities, either directly or through subsidiary corporations: Provided, however, that the term "dealing in investment securities" as used herein, shall not be deemed to include the purchasing and selling of securities without recourse, solely upon order, and for the account of, customers; and provided further, that "investment securities," as used herein, shall not be deemed to include obligations of the United States, or general obligations of any state or of any political subdivision thereof, or of cities, towns, or other corporate municipalities of any state or obligations issued under authority of the Federal Farm Loan Act, as amended, or issued by the federal home loan banks or the Home Owner's Loan Corporation.

Any provision in conflict with this subdivision contained in the articles of incorporation heretofore issued to any banking corporation is hereby revoked.

- (5) Subject to the approval of the Commissioner of Banks and on the authority of its board of directors, or a majority thereof, to enter into such contracts, incur such obligations and generally to do and perform any and all such acts and things whatsoever as may be necessary or appropriate in order to take advantage of any and all memberships, loans, subscriptions, contracts, grants, rights or privileges, which may at any time be available or inure to banking institutions, or to their depositors, creditors, stockholders, conservators, receivers or liquidators, by virtue of those provisions of section 8 of the Federal Banking Act of 1933 (section 12B of the Federal Reserve Act as amended) which establish the Federal Deposit Insurance Corporation and provide for the insurance of deposits, or of any other provisions of that or any other act or resolution of Congress to aid, regulate or safeguard banking institutions and their depositors, including any amendments of the same or any substitutions therefor; also, to subscribe for and

acquire any stock, debentures, bonds or other types of securities of the Federal Deposit Insurance Corporation and to comply with the lawful regulations and requirements from time to time issued or made by such corporation.

- (6) Maintain separate departments and deposit in its commercial department to the credit of its trust department all uninvested fiduciary funds of cash and secure, under rules and regulations of the State Banking Commission, all such deposits in the name of the trust department whether in consolidated deposits or for separate fiduciary accounts, by segregating and delivering to the trust department such securities as may be eligible for the investment of the sinking funds of the State of North Carolina, equal in market value to such deposited funds, or readily marketable commercial bonds having not less than a recognized "A" rating equal to one hundred and twenty-five per centum (125%) of such deposits. Such securities shall be held by the trust department as security for the full payment or repayment of all such deposits, and shall be kept separate and apart from other assets of the trust department. Until all of such deposits shall have been accounted for to the trust department or to the individual fiduciary accounts, no creditor of the bank shall have any claim or right to such security. When fiduciary funds are deposited by the trust department in the commercial department of the bank, the deposit thereof shall not be deemed to constitute a use of such funds in the general business of the bank and the bank in such instance shall not be liable for interest on such funds. To the extent and in the amount such deposits may be insured by the Federal Deposit Insurance Corporation, the amount of security required for such deposits by this section may be reduced.

The Banking Commission shall have power to make such rules and regulations as it may deem necessary for the enforcement of the provisions of the preceding paragraph, and such authority shall exist and is hereby conferred under the general authority heretofore conferred upon said Commission as well as by this paragraph.

- (7) To issue, advise and confirm letters of credit authorizing the beneficiaries thereof to draw upon the institution or its correspondents.
- (8) To receive money for transmission.
- (9) To become a member of a clearinghouse association and to pledge assets required for its qualification.
- (10) To provide for the performance of bank service corporation services, such as data processing services and bookkeeping, subject to such rules and regulations as may be adopted by the State Banking Commission. (1921, c. 4, s. 26; 1923, c. 148, s. 5; C.S., s. 220(a); Ex. Sess. 1924, c. 67; 1925, c. 279; 1927, c. 47, s. 5; 1931, c. 243, s. 5; 1933, c. 303; 1935, c. 81, s. 1; c. 82; 1937, c. 154; 1941, c. 77; 1943, c. 234; 1955, c. 590; 1961, c. 954; 1967, c. 789, s. 6; 1969, c. 541, s. 8; c. 1303, ss. 8, 9; 1979, c. 483, s. 4; 1981, c. 671, s. 7.)

Cross References. — As to powers conferred upon business corporations, see § 55-17 et seq. As to forms for corporate conveyances, see § 47-41.

Effect of Amendments. — The 1981 amendment, effective July 1, 1981, restored the designation "a" following the introductory language

in subdivision (3) and restored paragraphs b and c of subdivision (3), which had been deleted by the 1979 amendment.

Legal Periodicals. — For comment on subdivision (6), see 19 N.C.L. Rev. 544.

For comment on usury law in North Carolina, see 47 N.C.L. Rev. 761 (1969).

CASE NOTES

State banks have no powers beyond those expressly granted, or those fairly incidental thereto, in this Article. *Sparks v. Union Trust Co.*, 256 N.C. 478, 124 S.E.2d 365 (1962).

Negotiations of Evidences of Debt. — In the course of its dealings and for a lawful purpose, a bank may negotiate notes, drafts, bills of exchange, and other evidences of indebtedness embraced by this section. *Richmond County v. Page Trust Co.*, 195 N.C. 545, 142 S.E. 786 (1928).

Power to Become Surety or Lend Credit. — In the absence of an express grant of authority, a banking corporation, as a rule, does not have the power to become the guarantor or surety of the obligation of another person, or to lend its credit to any person. *Indiana Quarries*

Co. v. Angier Bank & Trust Co., 190 N.C. 277, 129 S.E. 619 (1925).

A bank is not authorized to become a guarantor, except where it is necessary to protect its rights where the guaranty relates to commercial paper and is an incident to the purchase and sale thereof, or when the guaranty is especially authorized by law. *Indiana Quarries Co. v. Angier Bank & Trust Co.*, 190 N.C. 277, 129 S.E. 619 (1925).

It is general banking practice to require that interest be paid in advance. *Huski-Bilt, Inc. v. First-Citizens Bank & Trust Co.*, 271 N.C. 662, 157 S.E.2d 352 (1967).

Cited in *Lambeth v. Lambeth*, 249 N.C. 315, 106 S.E.2d 491 (1959); *Lenoir Fin. Co. v. Currie*, 254 N.C. 129, 118 S.E.2d 543 (1961).

§ 53-43.1. Obligations of agencies supervised by Farm Credit Administration as securities for deposits of public funds.

Notwithstanding any restrictions or limitations on securities for deposits of public funds contained in any law of this State, federal farm loan bonds issued by federal land banks pursuant to the Federal Farm Loan Act as amended, federal intermediate credit bank debentures issued by federal intermediate credit banks pursuant to the Federal Farm Loan Act as amended, and debentures issued by Central Bank for Cooperatives and regional banks for cooperatives pursuant to the Farm Credit Act of 1933 as amended, or by any of such banks, or any notes, bonds, debentures, or similar type obligations, consolidated or otherwise, issued by any farm credit institution pursuant to authorities contained in the Farm Credit Act of 1971 (Public Law 92-181), as amended, shall be without limitation, authorized securities for all deposits of public funds for the State of North Carolina, of agencies of the State of North Carolina, of counties of North Carolina, and of municipalities and other political subdivisions of the State of North Carolina. This section shall be cumulative to all other laws relating to securities for deposits of such funds. (1957, c. 507; 1973, c. 239, s. 2.)

§ 53-43.2. Obligations of agencies supervised by Federal Home Loan Bank Board as securities for deposits of public funds.

Notwithstanding any restrictions or limitations on securities for deposits of public funds contained in any law of this State, federal home loan banks securities issued by federal home loan banks pursuant to the Federal Home Loan Bank Act of 1932 as amended shall be without limitation, authorized securities for all deposits of public funds for the State of North Carolina, of agencies of the State of North Carolina, of counties of North Carolina, and of municipalities and other political subdivisions of the State of North Carolina. This section shall be cumulative to all other laws relating to securities for deposits of such funds. (1959, c. 1069, s. 1.)

§ 53-43.3. Officers and employees; share purchase and option plans.

Subject to any applicable rules or regulations of the State Banking Commission, a bank may grant options to purchase, sell or enter into agreements to sell shares of its capital stock to its officers or employees, or both, for a consideration of not less than one hundred percent (100%) of the fair market value of the shares on the date the option is granted, or, if pursuant to a stock purchase plan, eighty-five percent (85%) of the fair market value of the shares on the date the purchase price is fixed, pursuant to the terms of an officer-employee stock option plan or an officer-employee stock purchase plan which has been adopted by the board of directors of the bank and approved by the holders of at least two thirds of the particular class or classes of stock entitled to vote on such proposal and by the Commissioner of Banks. In no event shall the option to purchase such shares be for a consideration less than the par value thereof. (1967, c. 789, s. 7; 1973, c. 1127; 1981, c. 671, s. 8.)

Effect of Amendments. — The 1981 amendment, effective July 1, 1981, deleted "qualified" between "officer-employee" and "stock option plan" in the first sentence and deleted the former last sentence which read "Stock options

issued hereunder shall qualify as qualified stock options under the Internal Revenue Code of 1954, and corresponding provisions of subsequent United States law."

§ 53-43.4. Issuance of capital notes and debentures.

A bank shall have authority to issue capital notes or debentures, convertible or otherwise, subject to such regulations as the Banking Commission may adopt with respect thereto. (1967, c. 789, s. 7.)

§ 53-43.5. Minors' deposits and safe-deposit agreements.

(a) Deposits. — A bank, including an industrial bank, may operate a deposit account in the name of a minor or in the name of two or more persons, one or more of whom are minors, with the same effect upon its liability as if such minors were of full age. This section shall not affect the law governing transactions with minors in cases outside the scope of this section.

(b) Dealings with Minor. — A bank, including an industrial bank, may lease a safe-deposit box to and in connection therewith deal with a minor with the same effect as if leasing to and dealing with a person of full legal capacity. This section shall not affect the law governing transactions with minors in cases outside the scope of this section.

(c) Safe-Deposit Agreements. — An institution, including an industrial bank, may rent a safe-deposit box or other receptacle for safe deposit of property to, and receive property for safe deposit from, a married minor and spouse, whether adult or minor, jointly. This section shall not affect the law governing transactions with minors in cases outside the scope of this section. (1967, c. 789, s. 7; 1981, c. 599, s. 17.)

Effect of Amendments. — The 1981 amendment, effective Oct. 1, 1981, inserted "including an industrial bank" near the beginning of the

first sentences of subsections (a), (b) and (c).

Session Laws 1981, c. 599, s. 21, provides that the act shall not affect pending litigation.

CASE NOTES

Stated in *Gastonia Personnel Corp. v. Rogers*, 276 N.C. 279, 172 S.E.2d 19 (1970).

§ 53-43.6. School thrift or savings plan.

(a) A bank may arrange for the collection of savings from school children by the principal of the school, by the teachers, or by collectors, pursuant to regulations issued by the State Banking Commission and approved, in the case of public schools, by the board of education or board of trustees of the city or district in which the school is situated. The principal, teacher, or person authorized by the bank to make collections from the school children shall be the agent of the bank and the bank is liable to the pupil for all deposits made with such principal, teacher, or other authorized person to the same extent as if the deposits were made directly with the bank.

(b) The acceptance of deposits in furtherance of a school thrift or savings plan by an officer, employee or agent of a bank at any school shall not be construed as the establishment or operation of a branch or branch facility. (1967, c. 789, s. 7.)

§ 53-43.7. Safe-deposit boxes; unpaid rentals; procedure; escheats.

(a) If the rental due on a safe-deposit box has not been paid for one year, the lessor may send a notice by registered mail to the last known address of the lessee stating that the safe-deposit box will be opened and its contents stored at the expense of the lessee unless payment of the rental is made within 30 days. If the rental is not paid within 30 days from the mailing of the notice, the box may be opened in the presence of an officer of the lessor and of a notary public who is not a director, officer, employee or stockholder of the lessor. The contents shall be sealed in a package by the notary public who shall write on the outside the name of the lessee and the date of the opening. The notary public shall execute a certificate reciting the name of the lessee, the date of the opening of the box and a list of its contents. The certificate shall be included in the package and a copy of the certificate shall be sent by registered mail to the last known address of the lessee. The package shall then be placed in the general vaults of the lessor at a rental not exceeding the rental previously charged for the box.

(b) Any property, including documents or writings of a private nature, which has little or no apparent value, need not be sold but may be destroyed by the Treasurer or by the lessor, if retained by the lessor pursuant to a determination by the Treasurer under G.S. 116B-31(c).

(c) If the contents of the safe-deposit box have not been claimed within two years of the mailing of the certificate, the lessor may send a further notice to the last known address of the lessee stating that, unless the accumulated charges are paid within 30 days, the contents of the box will be delivered to the State Treasurer as abandoned property under the provisions of Chapter 116B.

(d) The lessor shall submit to the Treasurer a verified inventory of all of the contents of the safe-deposit box upon delivery of the contents of the box or such part thereof as shall be required by the Treasurer under G.S. 116B-31(c); but the lessor may deduct from any cash of the lessee in the safe-deposit box an amount equal to accumulated charges for rental and shall submit to the Treasurer a verified statement of such charges and deduction. If there is no cash, or insufficient cash to pay accumulated charges, in the safe-deposit box, the lessor may submit to the Treasurer a verified statement of accumulated

charges or balance of accumulated charges due, and the Treasurer shall remit to the lessor the charges or balance due, up to the value of the property in the safe-deposit box delivered to him, less any costs or expenses of sale; but if the charges or balance due exceeds the value of such property, the Treasurer shall remit only the value of the property, less costs or expenses of sale. Any accumulated charges for safe-deposit box rental paid by the Treasurer to the lessor shall be deducted from the value of the property of the lessee delivered to the Treasurer.

(e) Repealed by Session Laws 1979, 2nd Session, c. 1311, s. 5.

(f) A copy of this section shall be printed on every contract for rental of a safe-deposit box. (1967, c. 789, s. 7; 1979, 2nd Sess., c. 1311, s. 5.)

Effect of Amendments. — The 1979, 2nd Sess., amendment, effective January 1, 1981, rewrote subsections (b), (c), and (d), and deleted former subsection (e), which read: "The deposits

or proceeds from sales referred to in the preceding paragraph shall be subject to all the provisions of G.S. 116A-6, relating to the escheat of bank deposits."

§ 53-44. Investment in bonds guaranteed by United States.

(a) **Authority to Make Investments.** — Any bank, building and loan association, land and loan association, savings and loan association, insurance company, title insurance company, land mortgage company, fraternal order or benevolent association, or any other corporation incorporated under the laws of this State, and operating under the supervision of the Commissioner of Banks, Insurance Commissioner, or Superintendent of Savings and Loan Associations; the State Treasurer, as custodian of the assurance fund provided under the Torrens Act, or any officer charged with the investment of sinking funds of the State, any county, city, town, incorporated village, township, school district, school taxing district, or other district or political subdivision of government of the State; the North Carolina State Thrift Society, any clerk of the court holding money by color of his office or as receiver; and any person, firm or corporation acting as executor, administrator, guardian, trustee, or other person acting in a fiduciary capacity may invest in bonds issued, or in bonds which are fully and unconditionally guaranteed as to principal and interest by the United States, to the same extent as the same are now or may be hereafter authorized to invest in any obligation of the United States: Provided that all investments authorized hereunder shall be guaranteed, both as to the payment of principal and interest thereon, by the United States treasury.

(b) **Security for Loans and Deposits.** — No bank shall be required to maintain a reserve against deposits secured by any of the above-mentioned bonds equal in market value to the amount of such deposits, and such bonds shall be valid security for all loans and deposits to the same extent as are any obligations of the United States.

(c) **Bonds Deemed Cash in Settlements by Fiduciaries.** — In settlements by guardians, executors, administrators, trustees and others acting in a fiduciary capacity, the bonds and securities herein mentioned shall be deemed cash to the amount actually paid for same, including the premium, if any, paid for such bonds, and may be paid as such by the transfer thereof to the persons entitled and without any liability for a greater rate of interest than the amount actually accruing from such bonds. (1935, c. 164; 1937, c. 433.)

Cross References. — As to power of fiduciary to invest generally, see § 36A-2. For other provisions as to investment of funds in hands of clerks of court by color of their office, see § 7A-112.

Legal Periodicals. — For discussion of section, see 13 N.C.L. Rev. 362.

§ 53-44.1. Investments in obligations of agencies supervised by Farm Credit Administration.

Notwithstanding any restrictions or limitations on investments contained in any law of this State, federal farm loan bonds issued by federal land banks pursuant to the Federal Farm Loan Act as amended, federal intermediate credit bank debentures issued by federal intermediate credit banks pursuant to the Federal Farm Loan Act as amended, and debentures issued by Central Bank for Cooperatives and regional banks for cooperatives pursuant to the Farm Credit Act of 1933 as amended, or by any of such banks, or any notes, bonds, debentures, or similar type obligations, consolidated or otherwise, issued by any farm credit institution pursuant to authorities contained in the Farm Credit Act of 1971 (Public Law 92-181), as amended, shall be, without limitation, authorized investments of funds of banks, savings banks, trust companies, insurance companies, building and loan associations, savings and loan associations, credit unions, fraternal organizations, pension and retirement funds, and of fiduciary funds of executors, administrators, guardians and trustees, unless such trust and fiduciary funds are required to be otherwise invested by will, deed, order or decree of court, gift, grant or other instrument creating or fixing the trust. This section shall be cumulative to all other laws relating to investments of such funds. (1957, c. 508; 1973, c. 239, s. 3.)

§ 53-44.2. Investments in obligations of agencies supervised by Federal Home Loan Bank Board.

Notwithstanding any restrictions or limitations on investments contained in any law of this State, federal home loan banks securities issued by federal home loan banks pursuant to the Federal Home Loan Bank Act of 1932 as amended shall be without limitation, authorized investments of funds of banks, savings banks, trust companies, insurance companies, building and loan associations, savings and loan associations, credit unions, fraternal organizations, pension and retirement funds, and of fiduciary funds of executors, administrators, guardians and trustees, unless such trust and fiduciary funds are required to be otherwise invested by will, deed, order or decree of court, gift, grant or other instrument creating or fixing the trust. This section shall be cumulative to all other laws relating to investments of such funds. (1959, c. 1069, s. 2.)

§ 53-45. Banks, fiduciaries, etc., authorized to invest in securities approved by the Secretary of Housing and Urban Development, Federal Housing Administration, Veterans Administration, etc.

(a) Insured Mortgages and Obligation of National Mortgage Associations and Federal Home Loan Banks. — It shall be lawful for all commercial and industrial banks, trust companies, building and loan associations, savings and loan associations, insurance companies, mortgagees and loan correspondents approved by the Secretary of Housing and Urban Development or Federal Housing Administration, and other financial institutions engaged in business in this State, and for guardians, executors, administrators, trustees or others acting in a fiduciary capacity in this State to invest, to the same extent that such funds may be invested in interest-bearing obligations of the United States, their funds or moneys in their custody or possession which are eligible for investment, in bonds or notes secured by a mortgage or deed of trust insured or guaranteed by the Federal Housing Administration, Secretary of Housing

and Urban Development or the Veterans Administration, or in mortgages or deeds of trust on real estate which have been accepted for insurance or guarantee by the Federal Housing Administration, Secretary of Housing and Urban Development or Veterans Administration, and in obligations of a national mortgage association which obligations are insured or guaranteed by the United States Government, or bonds, debentures, consolidated bonds, or other obligations of any federal home loan bank or banks.

(b) Insured or Guaranteed Loans; Loans Purchased by National Mortgage Associations and Federal Home Loan Banks. — All such banks, trust companies, building and loan associations, savings and loan associations, insurance companies, mortgagees and loan correspondents approved by the Secretary of Housing and Urban Development, or Federal Housing Administration, and other financial institutions, and also all such guardians, executors, administrators, trustees or others acting in a fiduciary capacity in this State, may make such loans, secured by real estate, as the Secretary of Housing and Urban Development, the Federal Housing Administration, a national mortgage association, or the Veterans Administration has insured or guaranteed, or has made a commitment to insure or guarantee, and may obtain such insurance or guarantee; provided, further, that the above designated financial institutions, may make loans, secured by real estate, that are eligible and committed for sale to a national mortgage association, federal home loan bank, federal home loan mortgage corporation or other agency or instrumentality of the United States.

(c) Eligibility for Credit Insurance. — All banks, trust companies, building and loan associations, savings and loan associations, insurance companies, mortgagees and loan correspondents approved by the Secretary of Housing and Urban Development, or Federal Housing Administration and other financial institutions, on being approved as eligible for credit insurance by the Secretary of Housing and Urban Development, the Federal Housing Administration, or the Veterans Administration, may make such loans as are insured by the Secretary of Housing and Urban Development or Federal Housing Administration or insured or guaranteed by the Veterans Administration.

(d) Certain Securities Made Eligible for Collaterals, etc. — Whenever by statute of this State, collateral is required as security for the deposit of public or other funds; or deposits are required to be made with any public official or department; or an investment of capital or surplus, or a reserve or other fund is required to be maintained, consisting of designated securities, bonds, and notes secured by a mortgage or deed of trust insured or guaranteed by the Secretary of Housing and Urban Development, Federal Housing Administration, or Veterans Administration, debentures issued by the Secretary of Housing and Urban Development or the Federal Housing Administration and obligations of a national mortgage association shall be eligible for such purposes.

(e) General Laws not Applicable. — No law of this State prescribing the nature, amount or form of security or requiring security upon which loans or investments may be made, or prescribing or limiting the rates or time of payment of the interest any obligation may bear, or prescribing or limiting the period for which loans or investments may be made, shall be deemed to apply to loans or investments made pursuant to the foregoing paragraphs. (1935, cc. 71, 378; 1937, c. 333; 1959, c. 364, s. 1; 1961, c. 291; 1971, c. 888.)

Legal Periodicals. — For comment on usury law in North Carolina, see 47 N.C.L. Rev. 761 (1969).

§ 53-46. Limitations on investments in securities.

The investment in any bonds or other debt obligations of any one firm, individual, or corporation, unless it be the obligations of the United States, or agency thereof, or other obligations guaranteed by the United States Government, State of North Carolina, or other state of the United States, or of some city, town, township, county, school district, or other political subdivision of the State of North Carolina, shall at no time be more than twenty percent (20%) of the unimpaired capital fund of any bank to an amount not in excess of two hundred fifty thousand dollars (\$250,000); and not more than ten percent (10%) of the unimpaired capital fund in excess of two hundred fifty thousand dollars (\$250,000). (1921, c. 4, s. 27; C.S., s. 220(b); 1927, c. 47, s. 6; 1931, c. 243, s. 5; 1933, c. 359; 1935, c. 199; 1937, c. 186; 1967, c. 789, s. 8; 1979, c. 483, s. 5.)

Cross References. — As to the suspension of this section, see § 53-49. As to limitation of amount of bank acceptances, see § 53-56.

CASE NOTES

Cited in Lenoir Fin. Co. v. Currie, 254 N.C. 129, 118 S.E.2d 543 (1961).

§ 53-47. Limitations on investment in stocks.

No bank shall make any investment in the capital stock of any other state or national bank: Provided, that nothing herein shall be construed to prevent banks doing business under this Chapter from subscribing to or purchasing, upon such terms as may be agreed upon, the capital stock of clearing corporations as defined in G.S. 25-8-102(3), the capital stock of banks organized under that act of Congress known as the "Edge Act" or the capital stock of central reserve banks whose capital stock exceeds one million dollars (\$1,000,000). To constitute a central reserve bank as contemplated by this Chapter, at least fifty percent (50%) of the capital stock of such bank shall be owned by other banks. The investment of any bank in the capital stock of such central reserve bank or bank organized under the act of Congress commonly known as the "Edge Act," shall at no time exceed ten percent (10%) of the paid-in capital and permanent surplus of the bank making same. No bank shall invest more than fifty percent (50%) of its permanent surplus in the stocks of other corporations, firms, partnerships, or companies, unless such stock is purchased to protect the bank from loss. Any stocks owned or hereafter acquired in excess of the limitations herein imposed shall be disposed of at public or private sale within six months after the date of acquiring the same, and if not so disposed of they shall be charged to profit and loss account, and no longer carried on the books as an asset. The limit of time in which said stocks shall be disposed of or charged off the books of the bank may be extended by the Commissioner of Banks if in his judgment it is for the best interest of the bank that such extension be granted; provided that the limitations imposed in this section on the ownership of stock in or securities of corporations is suspended to the extent (and to that extent only) that any bank operating under the supervision of the Commissioner of Banks may subscribe for and purchase shares of stock in or debentures, bonds or other types of securities of any corporation organized under the laws of the United States of America for the purpose of insuring to depositors a part or all of their funds on deposit in banks where and to such extent as such stock or security ownership is required in order to obtain the benefits of such deposit insurance for its depositors. (1921, c. 4, s. 28; C.S., s. 220(c); 1931, c. 243, s. 5; 1935, c. 81, s. 3; 1973, c. 497, s. 7.)

§ 53-48. Limitations of loans.

The total direct and indirect liability of any person, firm or corporation, other than a municipal corporation for money borrowed, including in the liabilities of a firm, the liabilities of the several members thereof, shall at no time exceed twenty percent (20%) of two hundred and fifty thousand dollars (\$250,000), or fractional part thereof, of the unimpaired capital fund of the bank and not more than ten percent (10%) of the excess of two hundred and fifty thousand dollars (\$250,000) of the unimpaired capital fund of the bank: Provided, however, that the discount of bills of exchange drawn in good faith against actual existing values, the discount of solvent trade acceptances, or other solvent commercial or business paper actually owned by the person, firm or corporation negotiating the same and the purchase of any notes, the making of any loans, secured by not less than a like face amount of bonds of the United States, or an agency of the United States, or other obligations guaranteed by the United States Government, or State of North Carolina or certificates of indebtedness of the United States, or agency thereof, or other obligations guaranteed by the United States Government, shall not be considered as money borrowed within the meaning of this section: Provided, further, that the limitations of this section shall not apply to loans or obligations to the extent that they are secured or covered by guarantees or by commitments or agreements to take over or purchase the same, made by any federal reserve bank or by the United States or any department, board, bureau, commission or establishment of the United States, including any corporation wholly owned directly or indirectly by the United States. (1921, c. 4, s. 29; 1923, c. 148, s. 6; C.S., s. 220(d); 1925, c. 119, s. 1; 1927, c. 47, s. 7; 1937, c. 419; 1943, c. 204; 1945, c. 127, s. 1; 1967, c. 789, s. 9; 1979, c. 483, s. 6.)

Cross References. — As to the suspension of this section, see § 53-49. As to limitation of amount of bank acceptances, see § 53-56.

CASE NOTES

Purpose. — The wisdom of this section and § 53-111 is manifest; banks whose business is conducted in strict compliance therewith seldom become insolvent. *State v. Cooper*, 190 N.C. 528, 130 S.E. 180 (1925).

Section Not Retroactive. — The statutory limitation upon a bank making loans to any one person or class of common interest, does not apply to loans, or extensions or renewals thereof, existing at the date of the ratification of this section. *State v. Cooper*, 190 N.C. 528, 130 S.E. 180 (1925).

Loss of Assets Must Be Shown in Action for Violation of Section. — In an action against the managing officials of a bank for wrongful depletion of assets in mismanagement of the affairs of the bank in making loans in excess of the limit set forth in this section, the evidence is insufficient to be submitted to a jury, if it appears that no loss to the assets of the bank has been caused by the acts of the officials. *Gordon v. Pendleton*, 202 N.C. 241, 162 S.E. 546 (1932).

Liability of Bank's Officers. — A bank must act through its officers and directors, and

where they have violated the provisions of this section as to lending the bank's money, the offense is committed by them under the meaning of the statute, and they are individually indictable therefor. *State v. Cooper*, 190 N.C. 528, 130 S.E. 180 (1925); *State v. Davidson*, 205 N.C. 735, 172 S.E. 489 (1934).

Showing of Knowledge of Violation Is Sufficient for Conviction. — Where the official position of an officer of a bank is such as necessarily to acquaint him of the violation of the statute respecting the making of loans, and to fix him as a party thereto, it is sufficient evidence to sustain his conviction of the misdemeanor prescribed by § 53-134. *State v. Cooper*, 190 N.C. 528, 130 S.E. 180 (1925).

Intent to Defraud Not Element of Offense. — An intent to defraud the bank or others is not required to be either alleged in the indictment or proved upon the trial of the issue raised by a plea of not guilty. Neither the bank nor any of its officers or directors have any discretion as to the making of loans which are thus forbidden. Intent is, therefore, not an element of the crime. The willful doing of the

unlawful act constitutes the crime declared by § 53-134 to be a misdemeanor, punishable as such in the discretion of the court. *State v. Cooper*, 190 N.C. 528, 130 S.E. 180 (1925).

Consolidation of Indictments under This Section and § 53-111. — An indictment charging the officer of the bank of violating § 53-111, and also unlawfully making loans for the bank to certain persons in excess of the

maximum percentage of the capital stock and permanent surplus, in violation of this section, alleges the commission of crimes of the same class. Where there are two indictments thereof against the same person they may be consolidated and tried together by the court. *State v. Cooper*, 190 N.C. 528, 130 S.E. 180 (1925).

Cited in *Lenoir Fin. Co. v. Currie*, 254 N.C. 129, 118 S.E.2d 543 (1961).

§ 53-49. Suspension of investment and loan limitation.

The board of directors of any bank, may by resolution duly passed at a meeting of the board, request the Commissioner of Banks to suspend temporarily the limitations on loans and investments as the same may apply to any particular loan or investment in excess of the limitations of G.S. 53-46, 53-47, and 53-48 which the bank desires to make. Upon receipt of a duly certified copy of such resolution, the Commissioner of Banks may, in his discretion, suspend the limitations on loans and investments insofar as they would apply to the loan or investment which the bank desires to make: Provided, however, such loan shall be amply secured and shall be for a period not longer than 120 days. (1921, c. 4, s. 30; C.S., s. 220(e); 1931, c. 243, s. 5; 1933, c. 239, s. 1.)

§ 53-50. Requirement of reserve fund.

(a) A bank which is not a member of the federal reserve system shall maintain at all times a reserve fund in such amounts and/or ratios as shall be fixed by regulation of the Banking Commission. In fixing the amounts and/or ratios of the reserve fund the Banking Commission shall take into consideration the level of liquidity necessary to assure the safety and soundness of the State banking system.

(b) A bank which is a member of the federal reserve system shall maintain at all times a reserve fund in accordance with the requirements applicable to a member bank under the laws of the United States.

(c) A bank shall give written notice to the Commissioner of Banks, in the manner prescribed by the Commissioner for such notice, of any deficiency in the reserve fund required under subsection (a) or (b) of this section within three business days after the close of any scheduled averaging period during which such deficiency occurs. (1921, c. 4, s. 31; C.S., s. 220(f); 1967, c. 789, s. 10; 1973, c. 554; 1981, c. 671, s. 9.)

Cross References. — As to effect of impaired capital upon reserve, see § 53-42. As to authority to join federal reserve bank, see § 53-61. As to failure to maintain required reserve, see § 53-111.

Effect of Amendments. — The 1981 amendment, effective July 1, 1981, substituted "amounts and/or ratios" for "percentages" in the first sentence of subsection (a) and deleted at the end of that sentence " which percentages shall be equal to or less than by not more than two

percentage points, but never greater than, those required under the laws of the United States for banks which are members of the Federal Reserve System." The amendment rewrote the second sentence of subsection (a), which formerly read: "The amount of the required reserve for each day shall be computed on the basis of average daily deposits covering such biweekly or shorter periods as shall be fixed by regulation of the Banking Commission."

CASE NOTES

Applied in *State v. Cooper*, 190 N.C. 528, 130 S.E. 180 (1925).

Cited in *Lenoir Fin. Co. v. Currie*, 254 N.C. 129, 118 S.E.2d 543 (1961).

§ 53-51. Reserve and cash defined.

(a) Reserve shall consist of:

(1) Cash on hand;

(2) Balances payable on demand, due from other approved solvent banks, which have been designated depositories as hereinafter provided in this Chapter; and

(3) Subject to rules and regulations, duly adopted by the State Banking Commission, fixing the maximum percentage of required reserves that may consist of such obligations, the following prescribed unencumbered, interest-bearing obligations, which shall not have more than 120 days to final maturity:

a. Obligations of the United States Treasury and of any agency of the United States which are guaranteed by the United States Government; and

b. General obligation of the State of North Carolina and of any political subdivision thereof which has received an investment rating of A or higher by a nationally recognized rating service.

(4) Balances maintained at a federal reserve bank either directly or on a pass-through basis to meet the reserve requirements of the federal reserve system.

(b) For purposes of this section, cash shall include both lawful money of the United States and exchange of any clearinghouse association. (1903, c. 275, s. 29; Rev., s. 232; 1919, c. 58; 1921, c. 4, s. 32; C.S., s. 220(g); 1979, c. 483, s. 7; 1981, c. 671, s. 10.)

Effect of Amendments. — The 1981 amendment, effective July 1, 1981, added subdivision (4) to subsection (a).

§ 53-52: Repealed by Session Laws 1981, c. 599, s. 19, effective October 1, 1981.

Cross References. — For present provisions relating to similar subject matter, see § 25-4-406.

Editor's Note. — Session Laws 1981, c. 599, s. 21, provides that the act shall not affect pending litigation.

§ 53-53: Repealed by Session Laws 1981, c. 599, s. 18, effective October 1, 1981.

Editor's Note. — Session Laws 1981, c. 599, s. 21, provides that the act shall not affect pending litigation.

§ 53-54. Transactions not performed during banking hours.

Nothing in any law of this State shall in any manner whatsoever affect the validity of, or render void or voidable, the payment, certification, or acceptance of a check or other negotiable instrument or any other transaction by a bank in this State, because done or performed during any time other than regular banking hours: Provided, that nothing herein shall be construed to compel any bank in this State, which by law or custom is entitled to close at 12 noon on any Saturday, or for the whole part day of any legal holiday, to keep open for the transaction of business, or to perform any of the acts or transactions aforesaid on any Saturday after such hour or on any legal holiday, except at its option. (1921, c. 4, s. 35; C.S., s. 220(j).)

§ 53-55. Commercial and business paper defined.

The term "commercial or business paper," as used in this Chapter, is hereby defined to mean a promissory note, and the term "trade acceptance" to mean a draft or bill of exchange issued or drawn for agricultural, industrial, or commercial purposes, or the proceeds of which have been used or are to be used for such purposes, but such definition shall not include notes, drafts, or bills of exchange covering merely investments, or issued or drawn for the purpose of carrying on or trading in stocks, bonds, or other investment securities, except bonds and notes of the government of the United States and State of North Carolina. (1921, c. 4, s. 36; 1923, c. 148, s. 7; C.S., s. 220(k); 1941, c. 268.)

§ 53-56. Bank acceptances defined.

Any bank doing business under this Chapter may accept for payment at a future date, drafts or bills of exchange having not more than six months' sight to run, drawn upon it by its customers under acceptance agreements, and which grow out of transactions involving the importation or exportation of goods; and issue letters of credit authorizing the holders thereof to draw upon it or its correspondents, provided that there is a definite bona fide contract for the shipment of goods within a specified reasonable time, and the existence of such contract is certified in the acceptance agreement; or which grow out of transactions involving the domestic shipment of goods, provided that shipping documents, conveying or securing to the accepting bank title to readily marketable goods, are attached or in the hands of an agent of the accepting bank, independent of the drawer, for his account, at the time of acceptance, or which are secured at the time of acceptance by warehouse receipts or other documents conveying or securing to the accepting bank title to readily marketable goods fully covered by insurance, the warehouse receipts or other documents to be those of a responsible warehouse, independent of the drawer, the acceptance to remain secured during the life of the acceptance unless suitable security of same character, or cash, be substituted: Provided, no bank shall accept drafts or bills of exchange under this section to an aggregate amount at any time more than equal to the sum of its capital and permanent surplus: Provided further, that no bank shall accept, whether in a foreign or domestic transaction, for any one person, firm, or corporation, to any amount at any time equal to more than twenty-five percent (25%) of its capital and permanent surplus, unless the accepting bank is secured either by attached documents or those held for its account by its agent, independent of the drawer, or by some other actual security of the same character. Should the accepting bank purchase or discount its own acceptances, such acceptances will be considered as a direct loan to the drawer, and be subject to the limitation on loans hereinbefore provided in this Chapter. The State Banking Commission may issue such further regulations as to such acceptances as it may deem necessary

in conformity with this Chapter. As used herein, the word "goods" shall be construed to mean and include goods, wares, merchandise, or agricultural products, including livestock. (1921, c. 4, s. 37; C.S., s. 220(1); 1931, c. 243, s. 5; 1939, c. 91, s. 2.)

§§ 53-57, 58-58: Repealed by Session Laws 1965, c. 700, s. 2.

Cross References. — For provisions of the Uniform Commercial Code as to bank deposits and collections, see §§ 25-4-101 to 25-4-504.

§ 53-59. Payment of deposits in trust.

Whenever any deposits shall be made in any bank or banking institution in this State by any person in trust for any other person who is a minor of the age of 15 years and upward, and no other or further notice of the existence and terms of a legal and valid trust shall have been given to the bank, in event of the death of the trustee, the same, or any part thereof, together with the dividends or interest thereon, may be paid to the person for whom said deposit was made: Provided, that the amount of said deposit is not in excess of one hundred dollars (\$100.00). (1921, c. 4, s. 40; C.S., s. 220(o).)

Cross References. — As to deposits by fiduciaries generally, see § 32-8 et seq.

Legal Periodicals. — For discussion of section, see 9 N.C.L. Rev. 13.

§ 53-60. Authorized investment in farm loan bonds.

Any bank or insurance company organized under the laws of this State, and any person acting as executor, administrator, guardian, or trustee, may invest in federal farm loan bonds issued by any federal farm loan bank or joint-stock land bank organized pursuant to an act entitled "An act of Congress to provide capital for agricultural development, to create standard forms of investment based upon farm mortgages to equalize rates of interest upon farm loans, to furnish a market for United States bonds, to create government depositories, and financial agents for the United States, and for other purposes," approved the seventeenth day of July, 1916, or any notes, bonds, debentures, or similar type obligations, consolidated or otherwise, issued by any farm credit institution pursuant to authorities contained in the Farm Credit Act of 1971 (Public Law 92-181), as amended. (1921, c. 4, s. 41; C.S., s. 220(p); 1973, c. 239, s. 4.)

§ 53-61. Authority to join federal reserve bank.

(a) **Terms Defined.** — The words "Federal Reserve Act," as herein used, shall be held to mean and to include the act of Congress of the United States, approved December 23, 1913, as heretofore and hereafter amended. The words "Federal Reserve Board" shall be held to mean the Federal Reserve Board created and described in the Federal Reserve Act. The words "federal reserve banks" shall be held to mean federal reserve banks created and organized under the authority of the Federal Reserve Act. The words "member bank" shall be held to mean any national or state bank or bank and trust company which has become or which becomes a member of one of the federal reserve banks created by the Federal Reserve Act.

(b) **Membership in Bank.** — Any bank incorporated under the laws of this State shall have the power to subscribe to the capital stock and become a member of a federal reserve bank.

(c) Powers Vested by Federal Reserve Act. — Any bank incorporated under the laws of this State which is, or which may become, a member of the federal reserve bank is by this Chapter vested with all powers conferred upon member banks of the federal reserve banks by terms of the Federal Reserve Act as fully and completely as if such powers were specifically enumerated and described therein, and such powers shall be exercised subject to all restrictions and limitations imposed by the Federal Reserve Act, or by regulations of the Federal Reserve Board made pursuant thereto. The right, however, is expressly reserved to revoke or to amend the powers herein conferred.

(d) Compliance with Reserve Requirements. — A compliance on the part of any such bank with the reserve requirements of the Federal Reserve Act shall be held to be a full compliance with the provisions of the laws of this State, which require banks to maintain cash balances in their vaults or with other banks, and no such bank shall be required to carry or maintain reserve other than such as is required under the terms of the Federal Reserve Act.

(e) Supervision and Examination of Bank. — Any such bank shall continue to be subject to the supervision and examination required by the laws of this State, except that the Federal Reserve Board shall have the right, if it deems necessary, to make examinations; and the authorities of this State having supervision over such banks may disclose to the Federal Reserve Board, or to the examiners duly appointed by it, all information in reference to the affairs of any bank which has become, or desires to become, a member of a federal reserve bank. (1921, c. 4, s. 42; C.S., s. 220(q).)

Cross References. — As to the amount of reserve required, see § 53-50.

CASE NOTES

Taxation under Employment Security Law. — A bank organized under the laws of this State is not an instrumentality of the federal government so as to exempt it from the tax imposed by the Employment Security Law,

Chapter 96, notwithstanding that the bank may be a member of the Federal Reserve System. *Unemployment Comp. Comm'n v. Wachovia Bank & Trust Co.*, 215 N.C. 491, 2 S.E.2d 592 (1939).

§ 53-62. Establishment of branches; tellers' windows and off-premises customer-bank communications terminals.

(a) The word "capital" as used in this section means capital stock and unimpaired surplus.

(b) Any bank doing business under this Chapter may establish branches or teller's windows in the cities or towns in which they are located, or elsewhere, after having first obtained the written approval of the Commissioner of Banks, which approval may be given or withheld by the Commissioner of Banks, in his discretion. The Commissioner of Banks, in exercising such discretion, shall take into account, but not by way of limitation, such factors as the financial history and condition of the applicant bank, the adequacy of its capital structure, its future earnings prospects, and the general character of its management. Such approval shall not be given until he shall find (i) that the establishment of such branch or teller's window will meet the needs and promote the convenience of the community to be served by the bank, and (ii) that the probable volume of business and reasonable public demand in such community are sufficient to assure and maintain the solvency of said branch or teller's window and of the existing bank or banks in said community.

(c) Such branch banks shall be operated as branches of and under the name of the parent bank, and under the control and direction of the board of directors and executive officers of said parent bank. The board of directors of the parent bank shall elect a cashier or such other officers as may be required to properly conduct the business of such branch, and a board of managers or loan committee shall be responsible for the conduct and management of said branch, but not of the parent bank or of any branch save that of which they are officers, managers, or committee: Provided, that the Commissioner of Banks shall not authorize the establishment of any branch or teller's window, the capital of whose parent bank is not sufficient in an amount to provide for the capital of at least one hundred thousand dollars (\$100,000) for the parent bank, and a capital of at least one hundred thousand dollars (\$100,000) for each branch or teller's window which it proposed to establish in cities or towns of 3,000 population or less; at least one hundred fifty thousand dollars (\$150,000) in cities or towns whose population exceeds 3,000 but does not exceed 10,000; at least two hundred thousand dollars (\$200,000) in cities or towns whose population exceeds 10,000, but does not exceed 25,000; at least two hundred fifty thousand dollars (\$250,000) in cities or towns whose population exceeds 25,000, but does not exceed 50,000; at least three hundred thousand dollars (\$300,000) in cities or towns whose population exceeds 50,000. The provisions of this subsection shall not be retroactive with respect to branches or teller's windows established or approved by the State Banking Commission prior to June 11, 1963. If a bank which hereafter proposes to establish a branch or teller's window is deficient in capital stock as measured by the above set-forth formula, it shall not be necessary for such bank to provide or allocate additional capital for branches or teller's windows established or approved by the State Banking Commission prior to June 11, 1963, until such a time as such bank makes application for an additional branch or teller's window. At that time sufficient capital and surplus must be allocated to bring the parent bank and all branches and teller's windows into compliance with the above requirements. The bank may, at its option, allocate capital stock and unimpaired surplus, or either, to its branches and teller's windows and may determine the proportion of each, or may allocate all capital stock or all unimpaired surplus. In applying this section, population shall be ascertained by the last preceding national census; provided, however, with respect to any branch or teller's windows established or approved by the State Banking Commission before June 11, 1963, population shall be ascertained by the last national census preceding the establishment of such branch.

(d) A teller's window within the meaning of this section shall be considered to be a place in which no loans or investments for the bank are made and at which only the functions and duties of a bank teller are performed. Upon securing the approval provided for in subsection (b) of this section and upon compliance with the capital requirements set forth in subsection (c) of this section, a teller's window may be established in a small community having no other banking facilities. Notwithstanding any other provisions in this section, a teller's window may also be established in a city or town in which the applicant bank's home office or a branch thereof is located or within two miles of the limits of such city or town without complying with the capital allocation requirements of subsection (c) of this section with respect to said teller's window if the Commissioner shall find that the capital of said bank will not be unduly impaired by the establishment of such teller's window, and any such teller's window which has been heretofore or may hereafter be so established or approved by the Banking Commission shall not be taken into account in computing the capital allocation requirements for the parent bank and other branches and teller's windows of such bank.

(d1) Subject to such rules and regulations as may be prescribed by the State Banking Commission with regard to their use, maintenance and supervision, any bank may establish off the premises of any principal office, branch or

teller's window a customer-bank communications terminal, point-of-sale terminal, automated teller machine, automated banking facility or other direct or remote information-processing device or machine, whether manned or unmanned, through or by means of which information relating to any financial service or transaction rendered to the public is stored and transmitted, instantaneously or otherwise, to or from a bank or other nonbank terminal; and the establishment and use of such a device or machine shall not be deemed a branch or teller's window, and the capital requirements and standards for approval of a branch or teller's window, all as set forth in subsections (b) and (c) above, shall not be applicable to the establishment of any such off-premises terminal device or machine; provided, however, that no bank, savings and loan association, savings bank, credit union or any other financial institution which is not domiciled in North Carolina may establish in North Carolina any information processing device or machine described in this subsection.

(e) A bank may discontinue a branch office or teller's window upon resolution of its board of directors or board of managers. Upon the adoption of such a resolution, the bank shall file a certification with the Commissioner of Banks specifying the location of the branch office or teller's window to be discontinued and the date upon which it is proposed that the discontinuance shall be effective. This certificate must state the reasons for the closing of such branch or teller's window and indicate that the needs and conveniences of the community would still be adequately met. Notice stating the intention to discontinue said branch or teller's window shall be published in a newspaper serving such community once a week for four consecutive weeks before any certificate requesting discontinuance is filed with the Commissioner of Banks. No such branch or teller's window may be discontinued until approved by the Commissioner of Banks, who shall first hold a public hearing thereon, if so requested by any interested party.

(f) Any action taken by the Commissioner of Banks pursuant to this section shall be subject to review by the State Banking Commission which shall have the authority to approve, modify or disapprove any action taken or recommended by the Commissioner of Banks. (1921, c. 4, s. 43; Ex. Sess. 1921, c. 56, s. 2; C.S., s. 220(r); 1927, c. 47, s. 8; 1931, c. 243, s. 5; 1933, c. 451, s. 1; 1935, c. 139; 1947, c. 990; 1953, c. 1209, ss. 2, 5; 1963, c. 793, s. 3; 1967, c. 789, s. 11; 1975, cc. 553, 850.)

Legal Periodicals. — For comment on amendments, see 11 N.C.L. Rev. 199; 13 N.C.L. Rev. 360.

CASE NOTES

- I. General Consideration.
- II. Needs and Convenience Test.
- III. Solvency Test.
- IV. Branches of National Banks.

I. GENERAL CONSIDERATION.

Purpose. — The motivation for this section was to minimize the danger of a run on a bank due to a rumor of insolvency. *State ex rel. Banking Comm'n v. Lexington State Bank*, 281 N.C. 108, 187 S.E.2d 747 (1972).

The purpose of subsection (b) of this section was to require that each separate branch contribute to the solvency of the system. *State ex rel. Banking Comm'n v. Lexington State Bank*, 281 N.C. 108, 187 S.E.2d 747 (1972).

The purpose to be accomplished by subsection (b) was protection of the solvency of banks. *State ex rel. Banking Comm'n v. Lexington State Bank*, 281 N.C. 108, 187 S.E.2d 747 (1972).

What Commission Must Find. — As a condition precedent to the establishment of a branch, the Commissioner of Banks must find that such branch will meet the needs of the community and the probable volume of business will be sufficient to assure and maintain

the solvency of such branch. *State ex rel. Banking Comm'n v. Lexington State Bank*, 281 N.C. 108, 187 S.E.2d 747 (1972).

No Provision for Approval Where Subsection (b) Test Not Met. — No provision is made for the approval of any branch that fails to meet the requirements of subsection (b)(i) and (ii). *State ex rel. Banking Comm'n v. Lexington State Bank*, 281 N.C. 108, 187 S.E.2d 747 (1972).

Consolidation of Applications for Hearing. — Applications for branches may be consolidated and heard together, but the evidence and finding must be sufficient to support each application independent of the other. *State ex rel. Banking Comm'n v. Lexington State Bank*, 281 N.C. 108, 187 S.E.2d 747 (1972).

The fact that the Commission consolidated two applications for hearing, and made findings and conclusions applicable to both, does not of itself invalidate an order approving the applications. *State ex rel. Banking Comm'n v. Lexington State Bank*, 12 N.C. App. 232, 182 S.E.2d 854 (1971).

While two applications by a bank to establish branches in the same city may be consolidated for hearing, each application must be treated as a separate application and be approved or denied on the basis of the evidence relating thereto, and separate findings and conclusions must be made as to each application. *State ex rel. Banking Comm'n v. Lexington State Bank*, 281 N.C. 108, 187 S.E.2d 747 (1972).

Applied in *First-Citizens Bank & Trust Co. v. Camp*, 409 F.2d 1086 (4th Cir. 1969); *First-Citizens Bank & Trust Co. v. Camp*, 432 F.2d 481 (4th Cir. 1970); *State ex rel. Banking Comm'n v. Bank of Rocky Mount*, 12 N.C. App. 112, 182 S.E.2d 625 (1971); *State ex rel. Banking Comm'n v. Lucama-Kenly Bank*, 17 N.C. App. 557, 195 S.E.2d 69 (1973).

Cited in *Lenoir Fin. Co. v. Currie*, 254 N.C. 129, 118 S.E.2d 543 (1961); *NCNB Corp. v. United States*, 651 F.2d 942 (4th Cir. 1981).

II. NEEDS AND CONVENIENCE TEST.

No Conflict with Federal Antitrust Statutes. — There is no conflict between the policies of the federal antitrust statutes and the "need and convenience" test for the establishment of a branch bank. *First Nat'l Bank v. Wachovia Bank & Trust Co.*, 448 F.2d 637 (4th Cir. 1971).

Needs of Community Is an Administrative Question. — With respect to banking, what will serve the needs of the community is, to a substantial degree, an administrative question involving a multiplicity of factors which cannot be given inflexible consideration. *State ex rel. Banking Comm'n v. Avery County Bank*, 14 N.C. App. 283, 188 S.E.2d 9, cert. denied, 281 N.C. 514, 189 S.E.2d 35 (1972); *State ex rel. Banking Comm'n v. Cabarrus Bank & Trust*

Co., 15 N.C. App. 183, 189 S.E.2d 496 (1972).

But Banking Commission Does Not Have Untrammelled Discretion. — The Banking Commission does not have untrammelled discretion in determining what will meet the needs and promote the convenience of the community. *State ex rel. Banking Comm'n v. Avery County Bank*, 14 N.C. App. 283, 188 S.E.2d 9, cert. denied, 281 N.C. 514, 189 S.E.2d 35 (1972).

Factors Used to Determine Need and Convenience. — Determination of whether a proposed branch bank will meet the needs and promote the convenience of the community to be served should involve a consideration of at least the following factors: (1) whether existing banks provide a full complement of banking services at competitive rates and fees; (2) the need for specialized services offered by the applicant bank not presently available through existing banks, examples of such services being: a. larger lending limits, b. trust department services, c. consumer and commercial loan expertise, d. international banking, e. farm development services, f. industrial development services, g. automated accounting and check clearance services; (3) the extent to which management of existing banks has been active and vigorous as evidenced by the assumption of leadership and participation in the economic growth of the community; (4) the composition of the population and its prospects for growth; (5) the nature and strength of the economy and its prospects for growth; (6) the extent to which competition from the entry of a new bank in the area will stimulate the economy and make for a more healthy banking business; and (7) the extent to which the entry of the new bank has public support in the community. *Bank of New Bern v. Wachovia Bank & Trust Co.*, 353 F. Supp. 643 (E.D.N.C. 1972).

Factors Bearing on Need and Convenience Not Specified in Section. — This section does not provide any degree of specificity as to the factors, proof of which would show the presence or absence of "need and convenience" for a new branch bank. *First-Citizens Bank & Trust Co. v. Camp*, 409 F.2d 1086 (4th Cir. 1969); *State ex rel. Banking Comm'n v. Cabarrus Bank & Trust Co.*, 15 N.C. App. 183, 189 S.E.2d 496 (1972).

Applicant Need Not Establish Existence of Specific Unmet Banking Need. — Subsection (b) of this section does not require that an applicant bank establish the existence of specific, unmet banking needs as a prerequisite to the establishment of a branch bank. *State ex rel. Banking Comm'n v. Avery County Bank* 14 N.C. App. 283, 188 S.E.2d 9, cert. denied, 281 N.C. 514, 189 S.E.2d 35 (1972); *State ex rel. Banking Comm'n v. Cabarrus Bank & Trust Co.*, 15 N.C. App. 183, 189 S.E.2d 496 (1972).

But Merely Offering to Provide Alternative Banking Services Is Not Sufficient. —

Absent some indication that additional competition is desirable, merely offering to provide alternative banking services is not sufficient under the statute. *State ex rel. Banking Comm'n v. Avery County Bank*, 14 N.C. App. 283, 188 S.E.2d 9 (1972).

Fact that applicant is the largest bank in North Carolina is irrelevant, alone, in determining needs and convenience. *Bank of New Bern v. Wachovia Bank & Trust Co.*, 353 F. Supp. 643 (E.D.N.C. 1972).

Quantum of Proof Required. — Quantum of proof to show need and convenience for the establishment of a branch office in a suburban area would be much less than that required to show need and convenience for the establishment of an entirely new banking facility in the city. *Bank of New Bern v. Wachovia Bank & Trust Co.*, 353 F. Supp. 643 (E.D.N.C. 1972).

Test of Substantial Evidence Not Met. — Where the evidence is uncontradicted that the existing bank offer a full complement of banking services at competitive rates, that the only specialized services offered by the applicant which are not offered by the existing banks are larger lending limits and international banking for which the likelihood of any need now or in the future has not been shown, and that there is no indication the proposed branch has public support in the community, the decision that a new bank is necessary does not meet the test of substantial evidence. *Bank of New Bern v. Wachovia Bank & Trust Co.*, 353 F. Supp. 643 (E.D.N.C. 1972).

III. SOLVENCY TEST.

Solvency tests under subsection (b) are twofold: Each new branch must not endanger the solvency of the parent bank and it must not endanger the solvency of another bank already in the field. *State ex rel. Banking Comm'n v. Lexington State Bank*, 281 N.C. 108, 187 S.E.2d 747 (1972).

Branch may not be established which would be financial failure or would endanger solvency of another bank already in the field. *State ex rel. Banking Comm'n v. Lexington State Bank*, 281 N.C. 108, 187 S.E.2d 747 (1972).

IV. BRANCHES OF NATIONAL BANKS.

State Laws Govern Branching of National Banks. — The Comptroller of the Currency must look to State law to determine if a branch bank can be opened. *Security Bank & Trust Co. v. Heimann*, 452 F. Supp. 776 (M.D.N.C. 1978).

National branch banking is limited to states the laws of which permit it, and even there only to the extent that the state laws permit branch banking. *First Nat'l Bank v. Wachovia Bank & Trust Co.*, 325 F. Supp. 523 (M.D.N.C.), *aff'd*, 448 F.2d 637 (4th Cir. 1971).

All statutory law requirements of the State dealing with the establishment of branch State banks must be complied with before a branch national bank can be lawfully approved by the Comptroller of the Currency of the United States. *First Citizens-Bank & Trust Co. v. Camp*, 281 F. Supp. 786 (E.D.N.C. 1968), *aff'd*, 409 F.2d 1086 (4th Cir. 1969).

The Comptroller of the Currency of the United States is bound by State law in considering the applications of national banks to establish branch banks. *Citizens Nat'l Bank v. Wachovia Bank & Trust Co.*, 329 F. Supp. 585 (M.D.N.C. 1971).

National Bank Branch Must Meet "Need and Convenience" Test. — In accordance with subsection (b)(i) of this section, the Comptroller of the Currency must find that the establishment of a branch bank "will meet the needs and promote the convenience of the community." *First Nat'l Bank v. Wachovia Bank & Trust Co.*, 448 F.2d 637 (4th Cir. 1971); *State ex rel. Banking Comm'n v. Cabarrus Bank & Trust Co.*, 15 N.C. App. 183, 189 S.E.2d 496 (1972); *Security Bank & Trust Co. v. Heimann*, 452 F. Supp. 776 (M.D.N.C. 1978).

And Solvency Test. — The plain wording of subsection (b)(ii) of this section, which is the second part of the test made applicable to the Comptroller of the Currency by North Carolina law, indicates that a new bank branch and the existing bank or banks must meet the solvency test. The statute does not say that the new branch and the existing branch or branches in the area must meet the test. *First Nat'l Bank v. Wachovia Bank & Trust Co.*, 448 F.2d 637 (4th Cir. 1971); *State ex rel. Banking Comm'n v. Cabarrus Bank & Trust Co.*, 15 N.C. App. 183, 189 S.E.2d 496 (1972); *Security Bank & Trust Co. v. Heimann*, 452 F. Supp. 776 (M.D.N.C. 1978).

Needs and Convenience of Community, Not Individuals, Considered. — To show that the needs of a community will be met by a proposed branch bank does not require evidence from potential bank customers of their individual needs which existing banks are unwilling or unable to provide; rather, the Comptroller of the Currency of the United States is free to apply the expertise of his office to determine if the proposed branch will meet the needs and promote the convenience of the community to be served, and if his decision is supported by substantial evidence it will be sustained. *Bank of New Bern v. Wachovia Bank & Trust Co.*, 353 F. Supp. 643 (E.D.N.C. 1972).

Standard for Judicial Review of Informal Administrative Agency Action. — The appropriate standard to be used by a federal district court in reviewing an administrative agency's justification for informal action is not the substantial evidence test, which is appropriate when reviewing findings made on a

hearing record, but rather whether the comptroller's adjudication was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." Where a fact-finding hearing is held, clearly the standard of review is substantial evidence. *Security Bank & Trust Co. v. Heimann*, 452 F. Supp. 776 (M.D.N.C. 1978).

If the Comptroller of the Currency followed the State law in determining if a branch bank could be opened, his decision must be affirmed unless it was arbitrary, capricious, or an abuse of discretion. *Security Bank & Trust Co. v. Heimann*, 452 F. Supp. 776 (M.D.N.C. 1978).

The decision of the Comptroller of the Currency authorizing the opening of a branch bank must be affirmed unless it was arbitrary and capricious. *Security Bank & Trust Co. v. Heimann*, 452 F. Supp. 776 (M.D.N.C. 1978).

Standard for Judicial Review of Fact-Gathering Hearing. — Where a hearing on the establishment of a branch bank was held and the hearing was merely to gather facts, that is a fact-gathering procedure, the standard

of review is the lesser arbitrary and capricious test. *Security Bank & Trust Co. v. Heimann*, 452 F. Supp. 776 (M.D.N.C. 1978).

Sufficient Findings Must Be Approved Even If Late and Grudgingly Made. — Where the Comptroller of the Currency of the United States has made, even though belated and grudgingly, legally sufficient findings and conclusions on the criteria prescribed by this section, and such findings are supported by substantial evidence, his action would be neither arbitrary nor capricious and must be approved. *Citizens Nat'l Bank v. Wachovia Bank & Trust Co.*, 329 F. Supp. 585 (M.D.N.C. 1971).

And Despite Avowed Intention Not to Comply with Section. — Where the opinion of the Comptroller of the Currency of the United States took into account the factors required to be considered by this section, his findings sufficed to satisfy the requirements of this section, notwithstanding his avowed intention not to do so. *First Citizens- Bank & Trust Co. v. Southern Nat'l Bank*, 329 F. Supp. 186 (E.D.N.C. 1971).

§ 53-63. Unlawful issuing of certificate of deposit.

It shall be unlawful for any bank to issue any certificate of deposit or other negotiable instrument of its indebtedness to the holder thereof except for lawful money of the United States, checks, drafts, or bills of exchange which are the actual equivalent of such money; nor shall such moneys, checks, drafts, or bills of exchange be the proceeds of any note given in payment of the purchase price of any stock. Any officer or employee of any bank violating the provisions of this section shall be guilty of a misdemeanor, and upon conviction thereof shall be fined or imprisoned, or both, in the discretion of the court. (1921, c. 4, s. 44; C.S., s. 220(s).)

CASE NOTES

Cited in *City of Southport v. Williams*, 290 F. 488 (E.D.N.C. 1923).

§ 53-64. Unlawful to loan on bank's own stock.

It shall be unlawful for any bank to make any loan secured by the pledge of its own shares of stock, nor shall any bank be the holder as pledgee, or as purchaser, of any portion of its capital stock unless such stock is purchased or pledged to it to prevent loss upon a debt previously contracted in good faith. Provided, that whenever any bank shall have shares of its own stock sold to, or pledged to it, for the purpose of preventing a loss upon a debt previously contracted, it shall dispose of all such shares of stock within a period of six months from the date such stock was sold or pledged to it and if not so disposed of, the same shall be charged to profit and loss and no longer carried as an asset of the bank. (1921, c. 4, s. 45; C.S., s. 220(t); 1927, c. 47, s. 9.)

CASE NOTES

Taking Stock in Payment of Note. — A payee bank may not cancel a note in consideration of shares of its stock delivered to it by the maker of the note, it not appearing that he was insolvent, or that the transaction was necessary to prevent loss to the bank, and payment so made is not a valid defense in the hands of another bank to which the note had been

indorsed before maturity by the payee bank as collateral security. *White v. Whitehurst*, 194 N.C. 305, 139 S.E. 598 (1927).

As to lien on stock under former law, see *Boyd v. Redd*, 120 N.C. 335, 27 S.E. 35 (1897); *First Nat'l Bank v. Riggins*, 124 N.C. 534, 32 S.E. 801 (1899); *In re W.W. Mills Co.*, 162 F. 42 (E.D.N.C. 1908).

§ 53-65. Deposits payable on demand.

Any bank may receive deposits of funds subject to withdrawals or to be paid upon the checks of the depositor. All deposits in such banks shall be payable on demand, without notice, except when the contract of deposit shall otherwise provide. (1921, c. 4, s. 46; C.S., s. 220(u).)

Cross References. — As to definition of "demand deposits," see § 53-1.

§ 53-66. Savings deposits.

Any bank conducting a savings department may receive deposits on such terms as are authorized by its board of directors and agreed to by its depositors. The board of directors shall prescribe the terms upon which such deposits shall be received and paid out, and a passbook or other evidence of deposit shall be issued to each depositor containing the rules and regulations adopted by the board of directors governing such deposits. By accepting such book or such other evidence of deposit the depositor assents and agrees to the rules and regulations therein contained. (1921, c. 4, s. 47; C.S., s. 220(v); 1959, c. 270.)

Legal Periodicals. — For discussion of section, see 9 N.C.L. Rev. 13.

CASE NOTES

Quoted in *Rosenstein v. Mechanics & Farmers Bank*, 51 N.C. App. 437, 276 S.E.2d 710 (1981).

§ 53-67. Banks controlled by boards of directors.

The corporate powers, business, and property of banks doing business under this Chapter shall be exercised, conducted, and controlled by its board of directors, which shall meet at least quarterly. Such board shall consist of not less than five directors, to be chosen by the stockholders, and shall hold office for one year, and until their successors are elected and qualified. The annual meeting of stockholders for the election of directors shall be held at such time as may be designated by the charter or the bylaws of the bank but shall be held not later than the thirty-first day of March in each year. In addition to the foregoing powers relating to the fixing of the number and the election of directors, the stockholders of a bank, at any stockholders' meeting, special or annual, may authorize not more than two additional directorships which may be left unfilled and to be filled in the discretion of the directors of the institution during the interval between such stockholders' meetings. (1921, c. 4, s. 48; C.S., s. 220(w); 1925, c. 170; 1965, c. 188; 1967, c. 789, s. 12.)

§ 53-68. Statements showing deposits of State and State officials.

All banks in which any money is on deposit by the State of North Carolina or any of the officials thereof shall, in their published statements as by law required, show the amount of money on deposit in such bank to the credit of the State or of any official thereof; and no officials of the State shall deposit money in any bank which shall refuse to comply with the provisions of this section. (1923, c. 211, s. 1; C.S., s. 220(x).)

Cross References. — As to deposit of State funds, see § 147-77 et seq.

§ 53-69: Repealed by Session Laws 1945, c. 635.

§ 53-70. No fees on remittances covering checks.

No bank or trust company in this State shall charge a fee on remittances covering checks. (1921, c. 20, s. 1; C.S., s. 220(z); 1971, c. 244, s. 1.)

§ 53-71. Checks payable in exchange.

In order to prevent accumulation of unnecessary amounts of currency in the vaults of the banks and trust companies chartered by this State, all checks drawn on said banks and trust companies shall, unless specified on the face thereof to the contrary by the maker or makers thereof, be payable at the option of the drawee bank, in exchange drawn on the reserve deposits of said drawee bank when any such check is presented by or through any federal reserve bank, post office, or express company, or any respective agents thereof. (1921, c. 20, s. 2; C.S., s. 220(aa).)

Cross References. — As to checks exempt from section, see § 53-73.

Legal Periodicals. — For discussion of sec-

tion, see 1 N.C.L. Rev. 133; 2 N.C.L. Rev. 36; 8 N.C.L. Rev. 55.

CASE NOTES

Purpose and Effect. — This section was enacted to relieve banks and trust companies, chartered by this State, of embarrassments growing out of the policy theretofore pursued by the federal reserve bank with respect to the collection of checks drawn on said banks and trust companies. It does not deal with or purport to deal with the rights or liabilities of depositors who in the transaction of their business draw checks on their deposits with said banks and trust companies. The purpose of the section and its only effect is to confer upon such banks and trust companies the right, in certain instances, to pay checks drawn on them in a medium other than money, and to deprive the payee or holder of such checks of the right to demand payment in money. *Morris v. Cleve*, 197 N.C. 253, 148 S.E. 253 (1929).

The effect of this section is as though the provision of the law is written into the face of the

check; and consequently where the maker or drawer does not specify cash payment, he agrees, as does the payee in accepting it, that if presented by or through a federal reserve bank, express company, etc., the check shall be payable by an exchange draft drawn by the payee bank on its reserved deposits. *Farmers' & Merchants' Bank v. Federal Reserve Bank*, 262 U.S. 649, 43 S. Ct. 651, 67 L. Ed. 1157 (1923); *Cleve v. Craven Chem. Co.*, 18 F.2d 711 (4th Cir. 1927).

Constitutionality. — This section does not violate the Constitution of the United States. *Farmers' & Merchants' Bank v. Federal Reserve Bank*, 262 U.S. 649, 43 S. Ct. 651, 67 L. Ed. 1157 (1923), overruling 183 N.C. 546, 112 S.E. 252 (1922); *Federal Land Bank v. Barrow*, 189 N.C. 303, 127 S.E. 3 (1925).

Construed Strictly. — This section should be construed strictly. *Morris v. Cleve*, 197 N.C. 253, 148 S.E. 253 (1929).

Section does not change the general rule that when a depositor draws his check on a bank or trust company chartered by this State, such check is payable in money, or at the option of the holder, in a medium other than money — such payment being at the risk of holder. *Morris v. Cleve*, 197 N.C. 253, 148 S.E. 253 (1929).

Federal reserve banks cannot require payment in any other medium than the exchange. *Federal Land Bank v. Barrow*, 189 N.C. 303, 127 S.E. 3 (1925).

Right to Require Payment in Money. — Under this section the drawer has the right to specify on the face of the check that payment shall be made in money, and in such case the drawee bank or trust company must pay in money, in any event. *Morris v. Cleve*, 197 N.C. 253, 148 S.E. 253 (1929).

Payment in money may be required if the check is presented for payment, in person, or by an agent for collection other than as prescribed by this section. *Morris v. Cleve*, 197 N.C. 253, 148 S.E. 253 (1929).

Certificates of Deposit. — This section has no application to certificates of deposit. *Citizens Nat'l Bank v. Fidelity & Cas. Co.*, 86 F.2d 4 (4th Cir. 1936), cert. denied, 299 U.S. 612, 57 S. Ct. 315, 81 L. Ed. 452 (1937).

Liability Where Exchange Unpaid. — Under this section, a drawee bank cannot charge checks drawn on it by its customers to the accounts of such customers, remit in drafts or exchange to the forwarding bank, and thereby be released, notwithstanding that said drafts or exchange are, for valid and lawful reasons, not paid. Where a check drawn on a bank or trust company chartered by this State is presented to the drawee bank, "by or through any federal reserve bank, post office or express company or any respective agent thereof," and such bank or trust company, in the exercise of the option conferred by said statute, sends to the forwarding bank its draft on its reserve deposits in payment of such check, it will not be

discharged of liability for the collection of its depositor's check until such draft on its reserve deposit has been paid. *Graham v. Proctorville Whse.*, 189 N.C. 533, 127 S.E. 540 (1925).

Where the payee of a check deposits it in a bank for collection and does not thereon indicate that the collecting bank is to require payment in money, he authorizes the collecting bank to collect in due course of mail and comes within the provisions of this section and former § 53-57 as being a check presented by or through a "post office." The collecting bank is not liable for accepting the check of the drawee bank on another bank, resulting ultimately in nonpayment, and the payee must suffer the loss thereon. *Braswell v. Citizens Nat'l Bank*, 197 N.C. 229, 148 S.E. 236 (1929).

Where a bank receives a check in payment of a note and elects to put it in the hands of a federal reserve bank for collection, which bank accepts the check of the drawee bank on another bank in payment, when the check would have been paid in course of collection had cash been demanded, the drawer and endorers on the original check are relieved of liability thereon, and may not be held if the check of the drawee bank was not paid because of its later insolvency; and this result is not affected by this section since the payee bank has the option of presenting the check for payment through the federal reserve bank or not. *Morris v. Cleve*, 197 N.C. 253, 148 S.E. 253 (1929), criticizing *Cleve v. Craven Chem. Co.*, 18 F.2d 711 (4th Cir. 1927).

Charging Check to Drawer's Account as Payment. — When the drawee bank has to the credit of the drawer funds sufficient and available for the payment of his check, and accepts and charges the check to the drawer's account, the check is paid, and the drawer is discharged from liability, not only on the check, but also for the debt in payment of which the check was drawn. *Morris v. Cleve*, 197 N.C. 253, 148 S.E. 253 (1929).

§ 53-72: Repealed by Session Laws 1971, c. 244, s. 3.

§ 53-73. Checks exempted.

All checks drawn on the banks and trust companies in this State in payment of obligations due the State of North Carolina or the federal government shall be exempt from the provisions of G.S. 53-71. (1921, c. 20, s. 4; C.S., s. 220(cc); 1971, c. 244, s. 2.)

§ 53-74: Repealed by Session Laws 1971, c. 244, s. 3.

§ 53-75. Statement of account from bank to depositor deemed final adjustment if not objected to within five years; statements of account to be rendered annually or on request.

When a statement of account has been rendered by a bank to a depositor accompanied by vouchers, if any, which are the basis for debit entries in such account, or the depositor's passbook has been written up by the bank showing the condition of the depositor's account and delivered to such depositor with like accompaniment of vouchers, if any, such account shall, after the period of five years from the date of its rendition in the event no objection thereto has been theretofore made by the depositor, be deemed finally adjusted and settled and its correctness conclusively presumed and such depositor shall thereafter be barred from questioning the incorrectness of such account for any cause. Every bank operating under this Chapter shall render a statement of account for each deposit account, including NOW or similar accounts, at least annually to the last known address of the depositor; provided, however, such statements are not required for time deposits, or for savings deposits evidenced by passbooks. Every bank operating under this Chapter shall render a statement of account for each deposit account, including demand, time, savings, NOW, and other similar accounts upon receipt of an appropriate request reasonably made by a depositor. (1929, c. 188, s. 1; 1981, c. 671, s. 11.)

Effect of Amendments. — The 1981 amendment, effective July 1, 1981, added the second and third sentences.

§ 53-76. Depositor not relieved from exercising diligence as to errors.

Nothing in the preceding section [G.S. 53-75] shall be construed to relieve the depositor from the duty now imposed by law of exercising due diligence in the examination of such account and vouchers, if any, when rendered by the bank. (1929, c. 188, s. 2; 1981, c. 599, s. 19.)

Cross References. — As to bank customer's duty to discover and report unauthorized signatures or alterations, see § 25-4-406.

Effect of Amendments. — The 1981 amendment, effective Oct. 1, 1981, deleted "and of immediate notification to the bank upon dis-

covery of any error therein, nor from the legal consequences of neglect of such duty; nor to prevent the application of G.S. 53-52 to cases governed thereby" from the end of the section. Session Laws 1981, c. 599, s. 21, provides that the act shall not affect pending litigation.

§ 53-77. Governor empowered to proclaim banking holidays.

The Governor is hereby authorized and empowered, by and with the advice and consent of the Council of State, to name and set apart such day or days, as he may from time to time designate, as banking holidays. During such period of holidays, all the ordinary and usual operations and business of all banking corporations, State or national, in this State shall be suspended, and during such period no banking corporation shall pay out or receive deposits, make loans or discounts, transfer credits, or transact any other banking busi-

ness whatsoever: Provided, however, that during any such holiday, including the holiday validated in this section, the Commissioner of Banks, with the approval of the Governor, may permit any or all such banking institutions to perform any or all of the usual banking functions.

The banking holiday heretofore proclaimed by the Governor of this State for Monday, Tuesday and Wednesday, March 6, 7, and 8, 1933 is hereby approved and validated, and the said days are hereby declared to be banking holidays in the State of North Carolina. (1933, c. 120, ss. 1, 2.)

Legal Periodicals. — For discussion of section, see 11 N.C.L. Rev. 195.

CASE NOTES

Cited in Hood v. Clark, 211 N.C. 693, 191 S.E. 732 (1937).

§ 53-77.1. Operation of banks on five-day week basis.

(a) Any bank as defined by G.S. 53-1 or 53-136, including national banking associations and federal reserve banks, or any branch or office of any of the foregoing, located in this State, may operate on a five-day week basis upon receiving the written permission of the Commissioner of Banks to do so. Such permission shall not be granted until after 10 days' notice published in a newspaper of general circulation in the community where the bank is located, and unless the Commissioner shall find that the best interests of the public and the bank will be served by a five-day week. The Commissioner of Banks may within his discretion hold a hearing in the community where the bank is located to determine whether the bank should be permitted to operate on a five-day week basis.

(b) The request of a bank desiring permission so to operate shall specify which day of the week it shall be closed and the notice published shall also specify the day of the week upon which the bank shall be closed.

(c) At the hearing the Commissioner shall hear all evidence offered and if he shall find that the best interests of the bank and the public will be served by a five-day week, he shall enter an order directing that the bank shall be closed upon the day of the week specified in the original request.

(d) A bank operating on a five-day week under the provisions of this Article shall comply with the following provisions:

(1) On one day of the week such bank shall remain open for not less than seven hours, three of which shall be after 3:00 P.M.

(2) The bank shall remain open on each of the following State legal public holidays: Lee-Jackson Day, Washington's Birthday, Halifax Day, Confederate Memorial Day, Mecklenburg Declaration of Independence Day, Columbus Day, Veteran's Day, and Election Day, unless such holiday falls on the day on which said bank is otherwise closed under the provisions of this section.

(e) Any day on which a bank or branch or office thereof shall remain closed as herein permitted, shall, as to such closed bank or branch or office constitute a legal holiday, and any act authorized, required, or permitted to be performed at, by or with respect to any such bank or branch or office on a day when it is closed may be performed on the next succeeding business day and no liability or loss of rights of any kind shall result from such delay.

(f) After a five-day week basis has been ordered pursuant to this section with respect to any bank, the above procedure shall be applicable with respect to any subsequent request to revert to a six-day week basis, and such reversion may

be ordered by the Commissioner if he shall find that the best interest of the bank and the public will be served by a six-day week.

(g) Every bank in the State shall continue to observe the same days of closing as are observed by the bank on May 6, 1971 until a change is authorized pursuant to this section. (1953, c. 965; 1955, cc. 546, 1220; 1957, c. 350, s. 1; c. 687; 1959, c. 156; 1971, c. 319, s. 1; 1977, c. 99, s. 1.)

Local Modification. — Craven: 1971, c. 34.

Cross References. — As to legal banking holidays, see § 53-77.2A.

§ 53-77.2: Repealed by Session Laws 1971, c. 319, s. 2.

Cross References. For present provisions as to operation of banks on a five-day week basis, see § 53-77.1.

§ 53-77.2A. Legal banking holidays.

(a) Any bank, as defined by G.S. 53-1 or G.S. 53-136, including national banking associations and federal reserve banks, or any branch or office of any of the foregoing located in this State, which operates on a five-day week basis, may observe as legal banking holidays the following:

- (1) New Year's Day, January 1;
- (2) Monday, January 2, when January 1 (New Year's Day) falls on a Sunday;
- (3) Monday, January 3, when January 1 (New Year's Day) falls on a Saturday;
- (4) Easter Monday;
- (5) Memorial Day, the last Monday in May;
- (6) Independence Day, July 4;
- (7) Monday, July 5, when July 4 (Independence Day) falls on a Sunday;
- (8) Monday, July 6, when July 4 (Independence Day) falls on a Saturday;
- (9) Labor Day, the first Monday in September;
- (10) Thanksgiving Day, the fourth Thursday in November;
- (11) Christmas Day, December 25;
- (12) December 26;
- (13) Monday, December 27, when December 25 (Christmas Day) falls on a Saturday.

(b) Any banking institution as hereinabove defined, operating on a six-day week basis, may, in addition to the above-named legal banking holidays, observe all other legal public holidays designated by G.S. 103-4.

(c) Notwithstanding subsections (a) and (b), any banking institution as hereinabove defined, whether operating on a five-day or six-day week basis may remain open on any legal holiday that it may observe as set forth above by notifying the Commissioner of Banks, in writing, 30 days prior to the legal holiday on which it wishes to remain open. (1977, c. 99, s. 2.)

§ 53-77.3. Banks suspending business during an emergency.

(a) As used in this section, unless the context otherwise requires:

- (1) "Bank" includes commercial banks, industrial banks, savings banks, trust companies, any branch or agency of a foreign banking organization, any person or association of persons lawfully carrying on the

business of banking, whether incorporated or not, and, to the extent that the provisions hereof are not inconsistent with and do not infringe upon paramount federal law, also includes national banks.

- (2) "Emergency" means any condition or occurrence, which may interfere physically with the conduct of normal business operations at one or more or all of the offices of a bank, or which poses an imminent or existing threat to the safety or security of persons or property, or both. Without limiting the generality of the foregoing, an emergency may arise as a result of any one or more of the following: fire; flood; earthquake; hurricanes; wind, rain, or snow storms; labor disputes and strikes; power failures; transportation failures; interruption of communication facilities; shortages of fuel, housing, food, transportation or labor; robbery or attempted robbery; actual or threatened enemy attack; epidemics or other catastrophes; riots, civil commotions, and other acts of lawlessness or violence, actual or threatened.
- (3) "Office" means any place at which a bank transacts its business or conducts operations related to its business.
- (4) "Officers" means the person or persons designated by the board of directors, board of trustees, or other governing body of a bank, to act for the bank in carrying out the provisions of this section or, in the absence of any such designation or of the officer or officers so designated, the president or any other officer currently in charge of the bank or of the office or offices in question.

(b) Whenever the Commissioner of Banks is of the opinion that an emergency exists, or is impending, in this State or in any part or parts of this State, he may authorize banks located in the affected area or areas to close any or all of their offices. In addition, if the Commissioner is of the opinion that an emergency exists, or is impending, which affects, or may affect, a particular bank or banks, or a particular office or offices thereof, but not banks located in the area generally, he may authorize the particular bank or banks, or office or offices so affected, to close. The office or offices so closed shall remain closed until the Commissioner declares that the emergency has ended, or until such earlier time as the officers of the bank determine that one or more offices, theretofore closed because of the emergency, should reopen, and, in either event, for such further time thereafter as may reasonably be required to reopen.

In the event communications systems should be so disrupted as to make it impossible or impractical for a bank official to communicate with the Commissioner of Banks, the bank officer or manager or other person in charge of any such bank or branch bank may close said office without prior approval of the Commissioner of Banks provided he gives prompt notice thereof to the Commissioner as soon as communications have been restored.

(c) Any day on which a bank, or any one or more of its offices, is closed during all or any part of its normal banking hours pursuant to the authorization granted under this section shall be, with respect to such bank or, if not all of its offices are closed, then with respect to any office or offices which are closed, a legal holiday for all purposes with respect to any banking business of any character. No liability, or loss of rights of any kind, on the part of any bank, or director, officer, or employee thereof, shall accrue or result by virtue of any closing authorized by this section.

(d) The provisions of this section shall be construed and applied as being in addition to, and not in substitution for or limitation of, any other law of this State or of the United States authorizing the closing of a bank or excusing the delay by a bank in the performance of its duties and obligations because of emergencies or conditions beyond the bank's control, or otherwise. (1971, c. 465.)

ARTICLE 7.

*Officers and Directors.***§ 53-78. Appointment of executive and loan committees by directors.**

The board of directors shall appoint an executive committee or committees, each of which shall be composed of at least three of its members with such duties and powers as are defined by the regulations or bylaws, who shall serve until their successors are appointed. Such executive committee or committees shall meet as often as the board of directors may require, which shall not be less frequently than once each month, and approve or disapprove all loans and investments. All loans and investments shall be made under such rules and regulations as the board of directors may prescribe.

The board of directors may appoint, in addition to the executive committee or committees, a general loan committee, the membership of which shall include at least three directors and such officers of the bank as may be appointed, with such duties and powers with respect to making loans and investments as are defined in the bylaws or by resolution of the board of directors, the members of such general loan committee to serve until their successors are appointed. Such general loan committee, if appointed, shall meet as often as the bylaws or resolution of the board of directors may require, which shall not be less frequently than once each month, and approve or disapprove all such loans and investments as may be required by the bylaws or by resolution of the board of directors to be submitted to the general loan committee. The board of directors of any bank, which has branches, may appoint, in addition to a general loan committee, a loan committee for the parent bank and for any branch, each of which committees shall include at least three members who are officers or members of the board of managers for such parent bank or branch, with such duties and powers with respect to approving or disapproving loans and investments as may be defined in the bylaws or by resolution of the board of directors, and under such rules and regulations as the board of directors may prescribe. Such loans and investments as are authorized or approved by a general loan committee or either of the other loan committees hereinabove provided for may, but need not, be approved or disapproved by the executive committee or committees. All loans and investments made, however, shall be authorized or approved by either the executive committee or committees, a general loan committee, or one of the other loan committees herein provided for. (1921, c. 4, s. 49; C.S., s. 221(a); 1951, c. 167, s. 1.)

§ 53-79. Minutes of meetings of directors and executive and loan committees.

Minutes shall be kept of all meetings of the board of directors, executive committee or committees, and of the loan committee or committees, if appointed, and the same shall be recorded in a book or books which shall be kept for that purpose; which book or books shall be kept on file in the bank. Such minutes shall show a record of the action taken by the board of directors, the executive committee or committees and the loan committee or committees on all loans, discounts, and investments made, authorized or approved, and such further action as the board of directors and the executive committee or committees shall take concerning the conduct, management and welfare of the bank. The minutes of the executive committee and all committees authorizing or approving loans and investments, showing the actions taken by such com-

mittees since the last meeting of the board of directors, shall be submitted to the board of directors at each meeting of the board. (1921, c. 4, s. 50; C.S., s. 221(b); 1951, c. 167, s. 2.)

CASE NOTES

Effect of Not Writing Minutes. — Where the proper officer fails to actually make a written minute or record of the proceedings, they may be proved by parol testimony where they are not so recorded, since proceedings of a

corporate meeting of stockholders or directors are facts. *Bailey v. Hassell*, 184 N.C. 450, 115 S.E. 166 (1922); *Everett v. Staton*, 192 N.C. 216, 134 S.E. 492 (1926).

§ 53-80. Qualifications of directors.

Every director of a bank doing business under this Chapter shall be the owner and holder of shares of stock in the bank representing not less than one thousand dollars (\$1,000) book value as of the last business day of the calendar year immediately prior to the election of such director. For the purpose of this section, book value shall consist of common capital stock, unimpaired surplus, undivided profits, and reserves for contingencies if any such reserves are segregations of capital. Where directors are appointed during the interval between stockholders' meetings pursuant to the provisions of G.S. 53-67, such directors shall hold the required qualifying shares as of the time of their appointment. Where the bank is a wholly owned subsidiary, the required qualifying shares shall be shares in the parent corporation. And every such director shall hold such shares in his own name unpledged and unencumbered in any way. The office of any director at any time violating any of the provisions of this section shall immediately become vacant, and the remaining directors shall declare his office vacant and proceed to fill such vacancy forthwith. Not less than three fourths of the directors of every bank doing business under this Chapter shall be residents of the State of North Carolina: Provided, that as to banks doing business before February 18, 1921, the requirements as to amount of stock owned by a director shall not apply unless the Commissioner of Banks shall rule that such director is not bona fide discharging his duties. (1921, c. 4, s. 51; C.S., s. 221(c); 1931, c. 243, s. 5; 1979, c. 483, s. 8.)

§ 53-81. Directors shall take oath.

Every director shall, within 30 days after his election, take and subscribe, in duplicate, an oath that he will diligently and honestly perform his duties in such office; and that he is the owner in good faith of the shares of stock of the bank required to qualify him for such office, standing in his own name on its books, and one of such oaths shall forthwith be filed with the Commissioner of Banks, and the other shall be kept on file in the bank. (1921, c. 4, s. 52; C.S., s. 221(d); 1931, c. 243, s. 5.)

§ 53-82. Liability of directors.

Any director of any bank who shall knowingly violate, or who shall knowingly permit to be violated by any officers, agents, or employees of such bank, any of the provisions of this Chapter shall be held personally and individually liable for all damages which the bank, its stockholders or any other person shall have sustained in consequence of such violation. Any aggrieved stockholder in any bank in liquidation may prosecute an action for the enforcement of the provisions of this section. Only one such action may be brought. The procedure shall follow as nearly as may be that prescribed by G.S.

44-14, relative to suits on bonds of contractors with municipal corporations. (1921, c. 4, s. 53; C.S., s. 221(e); 1935, c. 464.)

Cross References. — As to criminal liability, see §§ 53-126 to 53-134.

Editor's Note. — Section 44-14, referred to

in this section, was repealed by Session Laws 1973, c. 1194. See now § 44A-25 et seq.

CASE NOTES

Liability for False and Misleading Statement. — A false and misleading statement made by the directors by which one was led to make deposits gave a cause of action against the directors. It was also held that the directors are presumed to know the condition of the bank. *Townsend v. Williams*, 117 N.C. 330, 23 S.E. 461 (1895); *Tate v. Bates*, 118 N.C. 287, 24 S.E. 482 (1896); *Solomon v. Bates*, 118 N.C. 311, 24 S.E. 478, motion to modify opinion dismissed, 118 N.C. 321, 24 S.E.2d 746 (1896); *Houston v. Thornton*, 122 N.C. 365, 29 S.E. 827 (1898).

Who May Prosecute Action. — An action for damages against the directors, for false statements as to the bank's solvency made to private persons and in the bank's report to the Commission, is solely maintainable by the receiver of the bank unless the private person can show an injury peculiar to him as distinguished from the loss among the creditors generally. *Douglass v. Dawson*, 190 N.C. 458, 130 S.E. 195 (1925).

Cited in *State v. Cooper*, 190 N.C. 528, 130 S.E. 180 (1925).

§ 53-83. Examining committee of directors.

A committee of at least three directors or stockholders shall be appointed annually to examine, or to superintend the examination of the assets and the liabilities of the bank, and to report to the board of directors the result of such examination. The committee, with the approval of the board of directors, may provide for such examinations by a certified public accountant or clearinghouse examiner in any city where such examination is provided for by the rules of such clearinghouse association. A copy of such report of examination, which is herein required to be made, attested, and verified under oath by the signature of at least three members of such committee, shall forthwith be filed with the Commissioner of Banks. (1921, c. 4, s. 54; C.S., s. 221(f); 1931, c. 243, s. 5.)

§ 53-84. Depositories designated by directors.

By resolution of the board of directors, other banks organized under the laws of this State, or of another state, or of the National Banking Act of the United States, shall be designated as depositories or reserve banks in which a part of such bank's reserve shall be deposited, subject to payment on demand. A copy of such resolution shall, upon its adoption, be forthwith certified to the Commissioner of Banks and the depository so designated shall be subject to the approval of the Commissioner of Banks. For causes which he may deem adequate, the Commissioner of Banks shall have authority at any time to withdraw such approval.

A bank may deposit funds in a bank of a foreign country, but such deposits shall not constitute any part of its reserve as defined in G.S. 53-51. (1921, c. 4, s. 55; C.S., s. 221(g); 1931, c. 243, s. 5; 1967, c. 789, s. 14.)

Local Modification. — Guilford; Nash, Town of Spring Hope: 1933, c. 568; Halifax, Town of Hobgood; Haywood; Nash, Town of Bailey: 1935, c. 95.

Cross References. — As to the amount, etc., of the reserve, see § 53-50.

CASE NOTES

Cited in *State v. Cooper*, 190 N.C. 528, 130 S.E. 180 (1925).

§ 53-85. Stockholders' book.

The directors shall provide a book in which shall be kept the name and resident address of each stockholder, the number of shares held by each, the time when such person became a stockholder, together with all transfer of stock, stating the time when made, the number of shares and by whom transferred, which book shall be subject to the inspection of the directors, officers, and stockholders of the bank at all times during the usual hours for the transaction of business. (1921, c. 4, s. 56; C.S., s. 221(h).)

CASE NOTES

Right to Inspect. — Under this section the right to inspect stock books in banks is specifically given. *White v. Smith*, 256 N.C. 218, 123 S.E.2d 628 (1962). Cited in *Cooke v. Outland*, 265 N.C. 601, 144 S.E.2d 835 (1965).

§ 53-86. Directors, officers, etc., accepting fees, etc.

No gift, fee, commission, or brokerage charge shall be received, directly or indirectly, by any officer, director, or employee of any bank doing business under this Chapter, on account of any transaction to which the bank is a party. Any officer, director, employee, or agent who shall violate the provisions of this section shall be guilty of a misdemeanor, and shall be and thereafter remain ineligible as an officer, director, or employee of any bank doing business under this Chapter. Nothing in this section shall be construed to prevent the payment of necessary and proper fees to any licensed attorney or licensed real estate broker or salesman, who is a director but not an officer or employee of the bank for professional services rendered, and nothing in this section shall be construed to apply to commissions on insurance and surety bond premiums. (1921, c. 4, s. 57; C.S., s. 221(i); 1947, c. 695; 1971, c. 272.)

§ 53-87. Directors may declare dividends.

The board of directors of any bank may declare a dividend of so much of its undivided profits as they may deem expedient, subject to the requirements hereinafter provided. When the surplus of any bank having a capital stock of fifteen thousand dollars (\$15,000) or more is less than fifty percent (50%) of its paid-in capital stock, such bank shall not declare any dividend until it has transferred from undivided profits to surplus twenty-five percent (25%) of said undivided profits, or any lesser percentage that may be required to restore the surplus to an amount equal to fifty percent (50%) of the paid-in capital stock. When the surplus of any bank having a capital stock of less than fifteen thousand dollars (\$15,000) is less than one hundred percent (100%) of its paid-in capital stock, such bank shall not declare any dividend until it has transferred from undivided profits to surplus fifty percent (50%) of said undivided profits, or any lesser percentage that may be required to restore the surplus to an amount equal to one hundred percent (100%) of the paid-in capital stock. In order to ascertain the undivided profits from which such dividend may be made, there shall be charged and deducted from the actual profits:

- (1) All ordinary and extraordinary expenses, paid or incurred, in managing the affairs and transacting the business of the bank;
- (2) Interest paid or then due on debts which it owes;
- (3) All taxes due;
- (4) All overdrafts which have been standing on the books of the bank for a period of 60 days or longer;
- (5) All losses sustained by the bank. In computing the losses, there shall be included debts owing the bank which have become due and are not in process of collection, and on which interest for one year or more is due and unpaid, unless said debts are well secured; and debts reduced to final judgments which have been unsatisfied for more than one year and on which no interest has been paid for a period of one year, unless said judgments are well secured.
- (6) All investments carried on its books, which are prohibited under the provisions of this Chapter, or rules and regulations made by the Commissioner of Banks, pursuant to the powers conferred under this Chapter. (1921, c. 4, s. 58; C.S., s. 221(j); 1927, c. 47, s. 10; 1931, c. 243, s. 5.)

§ 53-88. Use of surplus.

The surplus of any bank doing business under this Chapter shall not be used for the purpose of paying expenses or losses until the credit to undivided profits has been exhausted. But any portion of such surplus may be converted into capital stock and distributed as a stock dividend, provided that such surplus shall not thereby be reduced below fifty percent (50%) of the paid-in capital of such bank, having a paid-in capital of fifteen thousand dollars (\$15,000) or more. When the surplus of any bank having a capital stock of less than fifteen thousand dollars (\$15,000) shall reach an amount equal to one hundred percent (100%) of its paid-in capital, the board of directors of such bank shall declare a dividend of fifty percent (50%) of said surplus and distribute the same as a stock dividend: Provided, that where the distribution of such a stock dividend would increase the capital stock of any bank to an amount greater than fifteen thousand dollars (\$15,000), the board of directors of such bank may, in its discretion, declare a stock dividend of only so much of said surplus as will be necessary to increase the stock of the said bank to fifteen thousand dollars (\$15,000). (1921, c. 4, s. 59; C.S., s. 221(k).)

Cross References. — As to definition of "surplus," see § 53-1.

§ 53-89. Overdrafts, payment by officer, etc.

Any officer (other than a director), or employee of a bank, who shall permit any customer or other person to overdraw his account, or who shall pay any check or draft, the paying of which shall overdraw any account, unless the same shall be authorized by the board of directors or by a committee of such board authorized to act, shall be personally and individually liable to such bank for the amounts of such overdrafts. (1921, c. 4, s. 60; C.S., s. 221(l).)

§ 53-90. Officers and employees shall give bond.

The active officers and employees of any bank before entering upon their duties shall give bond to the bank in a bonding company authorized to do business in North Carolina, in the amount required by the directors and upon such form as may be approved by the Commissioner of Banks, the premium for same to be paid by the bank. The Commissioner of Banks or directors of such

bank may require an increase of the amount of such bond whenever they may deem it necessary. If injured by the breach of any bond given hereunder, the bank so injured may put the same in suit and recover such damages as it may have sustained. (1921, c. 4, s. 61; Ex. Sess., 1921, c. 18; C.S., s. 221(m); 1927, c. 47, s. 11; 1929, c. 72, s. 2; 1931, c. 243, s. 5.)

CASE NOTES

Section Enters into and Forms Part of Bond. — The provision of this section requiring officers and employees of a bank to give bond in an amount required by the directors and upon such form as may be approved by the Commissioner of Banks, is the only statutory provision which becomes a part of the bond. *Hartford Accident & Indem. Co. v. Hood*, 226 N.C. 706, 40 S.E.2d 198 (1946). See *Hood v. Simpson*, 206 N.C. 748, 175 S.E. 193 (1934).

Effect of Renewal of Bond. — When a bond, which guarantees the fidelity of a bank cashier and guarantees the bank against loss by reason of embezzlement, etc., of said cashier, is executed for an indefinite term and thereafter is kept in force by the payment of annual premiums, for each year the officer was reelected, then each and every renewal thereof is a separate and distinct bond or independent contract.

Hood v. Simpson, 206 N.C. 748, 175 S.E. 193 (1934).

Where a bond guaranteeing the payment of any loss sustained through the dishonesty of a bank official, while "in the continuous employment of a bank" after a specified date, is kept in force for a period of years by the payment of the stipulated annual premium, recovery on the bond is limited to the maximum liability, therein stipulated for losses, occurring during the life of the bond, and the contention that the surety is liable for defalcations to the amount of the penal sum of the bond for each of the years during which the bond is kept in force, is untenable. *Hartford Accident & Indem. Co. v. Hood*, 226 N.C. 706, 40 S.E.2d 198 (1946), distinguishing *Hood v. Simpson*, 206 N.C. 748, 175 S.E. 193 (1934).

§ 53-91. When officers and employees may borrow.

(a) No officer or employee of a bank, nor a firm or partnership of which such officer or employee is a member, nor a corporation in which such officer or employee owns a controlling interest, shall borrow any amount whatever from the bank of which he is an officer or employee, except upon good collateral or other ample security or endorsement, and except upon prior approval by the bank's executive or loan committee appointed pursuant to G.S. 53-78.

(b) In addition, a certified copy of a resolution approving any loan made pursuant to this section, duly adopted by a majority of the board of directors and entered upon the minutes, including the names of the directors approving the resolution, shall be maintained in the office in which the indebtedness is housed and shall set forth the amount of the loan and a brief description of the security upon which the loan is made. The resolution approving such loan may be adopted by the board of directors either at a regular or special meeting held prior to the making of the loan, or at the next regular or special meeting held following the making of the loan: Provided, the resolution approving such loan shall be adopted by the board of directors prior to the extension of credit or the making of any loan to an executive officer who has authority to participate in major policy-making functions of the bank, otherwise than in the capacity of a director, where such extension of credit or loan would exceed twenty-five thousand dollars (\$25,000).

(c) Collateral or other security is not required with respect to a loan or loans made to an individual pursuant to this section when the total amount of such loan or loans, in the aggregate, do not exceed five thousand dollars (\$5,000).

(d) In no event shall loans the total of which exceeds one hundred thousand dollars (\$100,000) be made by any bank to any officer or employee of such bank.

(e) This section shall not apply to directors who are neither officers nor employees of the bank. (1921, c. 4, s. 62; C.S., s. 221(n); 1925, c. 119, s. 2; 1927, c. 47, s. 12; 1967, c. 789, s. 15; 1969, c. 41; 1979, c. 483, s. 9.)

ARTICLE 8.

*Commissioner of Banks and State Banking Commission.***§ 53-92. Appointment of Commissioner of Banks; State Banking Commission.**

On or before April 1, 1931, after the ratification of this section, and quadrennially thereafter, the Governor, with the advice and consent of the Senate, shall appoint a Commissioner of Banks who shall hold his office for a term of four years or until his successor has been appointed and has qualified, subject, however, to the provisions herein made as to his removal.

The State Banking Commission, which has heretofore been created, shall hereafter consist of the State Treasurer, who shall serve as an ex officio member thereof, and 12 members who shall be appointed by the Governor. At least five members of the said Commission shall be practical bankers, and the remaining seven members of the Commission shall be selected primarily as representatives of the borrowing public and shall not be employees or directors of any financial institution nor shall they have any interest in any regulated financial institution other than as a result of being a depositor or borrower. Under this section, no person shall be considered to have an interest in a financial institution whose interest in any financial institution does not exceed one half of one percent ($\frac{1}{2}$ of 1%) of the capital stock of that financial institution. These seven members of the Commission shall be selected so as to fully represent the consumer, industrial, manufacturing, professional, business and farming interests of the State. In the event that the composition of the Commission does not conform to that prescribed in the three preceding sentences on April 30, 1979, such composition shall be corrected thereafter by appropriate appointments as terms expire and as vacancies occur in the Commission; provided that no person shall serve on the Commission for more than two complete consecutive terms. As the terms of office of the appointive members of the Commission expire, their successors shall be appointed by the Governor for terms of four years each. Any vacancy occurring in the membership of the Commission shall be filled by the Governor for the unexpired term. The appointive members of said Commission shall be filled by the Governor for the unexpired term. The appointive members of said Commission shall receive as compensation for their services the same per diem and expenses as is paid to the members of the Advisory Budget Commission, which compensation shall be paid from the fees collected from the examination of banks as provided by law.

The Banking Commission shall meet at such time or times, and not less than once every three months, as the Commission shall, by resolution, prescribe, and the Commission may be convened in special session at the call of the Governor, or upon the request of the Commissioner of Banks. The State Treasurer shall be chairman of the said Commission.

No member of said Commission shall act in any matter affecting any bank in which he is financially interested, or with which he is in any manner connected. No member of said Commission shall divulge or make use of any information coming into his possession as a result of his service on such Commission, and shall not give out any information with reference to any facts coming into his possession by reason of his services on such Commission in connection with the condition of any State banking institution, unless such information shall be required of him at any hearing at which he is duly subpoenaed, or when required by order of a court of competent jurisdiction.

The Commissioner of Banks shall act as the executive officer of the Banking Commission, but the Commission shall provide, by rules and regulations, for

hearings before the Commission upon any matter or thing which may arise in connection with the banking laws of this State upon the request of any person interested therein, and review any action taken or done by the Commissioner of Banks.

The Banking Commission is hereby vested with full power and authority to supervise, direct and review the exercise by the Commissioner of Banks of all powers, duties, and functions now vested in or exercised by the Commissioner of Banks under the banking laws of this State; any party to a proceeding before the Banking Commission may, within 20 days after final order of said Commission and by written notice to the Commissioner of Banks, appeal to the Superior Court of Wake County for a final determination of any question of law which may be involved. The cause shall be entitled "State of North Carolina on Relation of the Banking Commission against (here insert name of appellant)." It shall be placed on the civil issue docket of such court and shall have precedence over other civil actions. In the event of an appeal the Commissioner shall certify the record to the Clerk of Superior Court of Wake County within 15 days thereafter. (1931, c. 243, s. 1; 1935, c. 266; 1939, c. 91, s. 1; 1949, c. 372; 1953, c. 1209, ss. 4, 6; 1961, c. 547, s. 2; 1967, c. 789, s. 16; 1969, c. 844, s. 6; c. 920; 1979, c. 478, s. 1; 1981, c. 884, s. 1.)

Effect of Amendments. — The 1981 amendment deleted the former second and third sen-

tences of the first paragraph, relating to the bond of the Commissioner.

CASE NOTES

Section 53-4 and this section are construed in pari materia. *Young v. Roberts*, 252 N.C. 9, 112 S.E.2d 758 (1960).

Finality of Commission Actions. — Had the Banking Commission been created as a purely administrative agency it might fairly be contended that the finality of its actions would be in an administrative sense only and appropriate legal proceedings could be had to test them. But the former Corporation Commission had judicial powers in dealing with banks. Its stock assessments were, for example, given the

effect of superior court judgments. *Corporation Comm'n v. Murphey*, 197 N.C. 42, 147 S.E. 667 (1929), *aff'd*, 280 U.S. 534, 50 S. Ct. 161, 74 L. Ed. 598 (1930). See also *Corporation Comm'n v. Bank of Vanceboro*, 200 N.C. 422, 157 S.E. 59 (1931).

Quoted in *Cooke v. Outland*, 265 N.C. 601, 144 S.E.2d 835 (1965).

Cited in *North Carolina Nat'l Bank v. Harwell*, 38 N.C. App. 190, 247 S.E.2d 720 (1978).

§ 53-92.1. Commission bound by requirements imposed on Commissioner as to certification of new banks, establishment of branches, etc.

Notwithstanding any other provisions of this Chapter, the State Banking Commission, in the exercise of its authority to review the action of the Commissioner of Banks, shall be bound by the requirements, conditions and limitations imposed in this Chapter on said Commissioner as to the certification of new banks or the establishments of branch banks or teller's windows. (1963, c. 793, s. 4.)

§ 53-93. Powers and duties of Commissioner.

The Commissioner of Banks shall have the powers, duties and functions herein given, and in addition thereto such other powers and rights as may be necessary or incident to the proper discharge of his duties. (1931, c. 243, s. 2.)

CASE NOTES

Source of Power to Liquidate Insolvent Banks. — The Commissioner of Banks, when engaged in the liquidation of the assets of an insolvent bank, as authorized by statute, does not derive his power or his authority from the court. His power and authority, both to take

possession of an insolvent bank, and to liquidate its assets for distribution among its creditors according to their respective rights, are derived from the statute. In re Central Bank & Trust Co., 206 N.C. 251, 173 S.E. 340 (1934).

§ 53-93.1. Deputy commissioner.

The Commissioner of Banks shall appoint, with approval of the Governor, and may remove at his discretion a deputy commissioner, who, in the event of the absence, death, resignation, disability or disqualification of the Commissioner of Banks, or in case the office of Commissioner shall for any reason become vacant, shall have and exercise all the powers and duties vested by law in the Commissioner of Banks. He shall receive such compensation as shall be fixed by the Governor with the approval of the Advisory Budget Commission.

Irrespective of the conditions under which the deputy commissioner may exercise the powers and perform the duties of the Commissioner of Banks, pursuant to the preceding paragraph, such deputy commissioner, in addition thereto, is hereby authorized and empowered at any and all times, at the discretion of the Commissioner of Banks, to perform such duties and exercise such powers of the Commissioner of Banks in the name of and on behalf of the Commissioner as the Commissioner, in his discretion, may direct.

This section is not to be construed to modify the provisions of G.S. 53-97. (1959, c. 273.)

§ 53-94. Right to sue and defend in actions involving banks; liability to suit.

As Commissioner of Banks he is empowered to sue and prosecute or defend in any action or proceeding in any courts of this State or any other state and in any court of the United States for the enforcement or protection of any right or pursuit of any remedy necessary or proper in connection with the subjects committed to him for administration or in connection with any bank or the rights, liabilities, property or assets thereof, under his supervision; but nothing herein shall be construed to render the Commissioner of Banks liable to be sued except as other departments and agencies of the State may be liable under the general law. (1931, c. 243, s. 3.)

§ 53-95. Commissioner to exercise powers under supervision of Banking Commission.

All the powers, duties, and functions granted to or imposed upon the Commissioner of Banks by law shall be exercised by him under the direction and supervision of the Banking Commission, and wherever provision is made in any law now in effect authorizing and permitting the Commissioner of Banks to make rules and regulations with respect to any actions or things required to be done under the banking laws of this State, such rules and regulations shall be made by the Banking Commission, and the words "the Commissioner of Banks," used in such statutes authorizing him to make rules and regulations, shall be construed to mean the Banking Commission, and the words "Banking Commission" substituted in such statutes for "Commissioner of Banks." (1931, c. 243, s. 4; 1939, c. 91, s. 2.)

§ 53-96. Salary of Commissioner; legal assistance and compensation.

The salary of the Commissioner of Banks shall be fixed by the Governor subject to the approval of the Advisory Budget Commission. The Governor may in his discretion appoint and assign to the Commissioner of Banks such legal assistance as in his judgment may be necessary. Compensation shall be within the salary classification for attorneys established by the State Personnel Commission. (1931, c. 243, s. 6; 1957, c. 541, s. 3; 1979, 2nd Sess., c. 1137, s. 53.)

§ 53-97. Vacancy appointments and removal.

Vacancies existing in the office of Commissioner of Banks by death, resignation or otherwise shall be filled by the Governor; and he shall have the power of removal for sufficient cause. (1931, c. 243, s. 8.)

§ 53-98. Seal of office of Commissioner; certification of documents.

The Commissioner of Banks shall have a seal of office bearing the legend "State of North Carolina — Commissioner of Banks," with such other appropriate device as he may adopt. (1931, c. 243, s. 9.)

§ 53-99. Official records.

(a) The Commissioner of Banks shall keep a record in his office of his official acts, rulings, and transactions which, except as hereinafter provided, shall be open to inspection, examination and copying by any person.

(b) Notwithstanding any laws to the contrary, the following records of the Commissioner of Banks shall be confidential and shall not be disclosed or be subject to public inspection:

- (1) Records compiled during or in connection with an examination, audit or investigation of any bank, banking office or trust department operating under the provisions of this Chapter;
- (2) Records containing information compiled in preparation or anticipation of litigation, examination, audit or investigation;
- (3) Records containing the names of any borrowers from a bank or revealing the collateral given by any such borrower: Provided, however, that every report of insider transactions made by a bank which report is required to be filed with the appropriate State or federal regulatory agency by either State or federal statute or regulation shall be filed with the Commissioner of Banks in a form prescribed by him and shall be open to inspection, examination and copying by any person;
- (4) Records prepared during or as a result of an examination, audit or investigation of any bank, bank affiliate, data service center or banking practice by an agency of the United States, or jointly by such agency and the Commissioner of Banks, if such records would be confidential under federal law or regulation;
- (5) Records of information and reports submitted by banks to federal regulatory agencies, if such records would be confidential under federal law or regulation;
- (6) Records of complaints from the public received by the banking department and concerning banks under its supervision if such complaints would or could result in an investigation;
- (7) Records of examinations and investigations of consumer finance licensees;

- (8) Records of pre-need burial contracts maintained pursuant to Article 7A of Chapter 65 of the General Statutes including investigations of such contracts and related credit inquiries;
- (9) Any letters, reports, memoranda, recordings, charts, or other documents which would disclose any information set forth in any of the confidential records referred to in subdivisions (1) through (8). (1931, c. 243, s. 10; 1977, 2nd Sess., c. 1181, s. 2; 1979, c. 255, s. 1.)

§ 53-100. General or special investigations of insolvent banks.

Whenever it may appear to be to the public interest, the Governor may cause a general or special investigation to be made of the affairs of any insolvent bank or banks, singly or in related groups, with a view to discovering and establishing the causes of the failure of such bank or banks, and responsibility therefor; and of discovering the dealings with such banks of persons, officers, corporations or municipalities which may have led to such insolvency or which may have endangered or involved any public funds therein. The Governor may assign counsel who shall prosecute such inquiry before the Commissioner of Banks, or a deputy or commissioner appointed by the Commissioner of Banks for the purpose; and the Commissioner of Banks is hereby empowered to conduct such investigation either in person or through such commissioner or deputy appointed by him. The inquiry shall be held at the office of the Commissioner of Banks in the City of Raleigh or at any other place or places in the State designated by the Commissioner of Banks under such rules and regulations as the State Banking Commission may prescribe and may be adjourned from time to time as convenience may require. Attendance of witnesses and production of papers may be required by subpoena under the hand of the Commissioner or his deputy, and on failure of any witness to appear as subpoenaed or his or her failure to produce any books or papers, as called for by such Commissioner or deputy on subpoena or other order due notice shall be served, at the instance of such Commissioner or deputy, of not less than three days to appear before a judge of the superior court residing in or holding courts within the district wherein such witness is subpoenaed or notified to appear or produce such records or papers, on a day certain and a place named, when such judge shall hear the matter and is authorized to punish such witness as for contempt as he may find on such hearing.

A summary of such investigation shall be made with the findings and recommendations of the Commissioner thereon, and a copy thereof submitted to the Governor, and when the facts shall disclose that any person or persons are criminally responsible, a summary shall be sent to the district attorney of the judicial district likely to have jurisdiction of the matter, whose duty it shall be to have the matter presented to the grand jury for its action. The Governor may employ counsel to assist in the prosecution of any person or persons criminally responsible and fix his compensation and the manner of its payment. (1931, c. 243, s. 11; 1973, c. 47, s. 2.)

§ 53-101. Clerical help.

The Commissioner of Banks is empowered to employ sufficient clerical and secretarial help, and other necessary labor to conduct the affairs of his office with economy and efficiency. Persons so employed shall be paid as other employees in the departments of the State and shall be under the same rules and regulations. (1931, c. 243, s. 12.)

§ 53-102. Offices.

Suitable offices shall be provided for the Commissioner of Banks in some state-owned public building in Raleigh. (1931, c. 243, s. 13.)

§ 53-103: Repealed by Session Laws 1945, c. 743, s. 1.

§ 53-104. Commissioner of Banks shall have supervision over, etc.

Every bank or corporation transacting the business of banking, or doing a banking business in connection with any other business, under the laws of and within this State, and any individual, partnership, association, or corporation which undertakes or attempts to transact the business of banking, or do a banking business in connection with any other business, shall be under the supervision of the Commissioner of Banks. It shall be his duty to execute and enforce through the State bank examiners and such other agents as are now or may hereafter be created or appointed, all laws which are now or may hereafter be enacted relating to banks as defined in this Chapter. For the more complete and thorough enforcement of the provisions of this Chapter, the State Banking Commission is hereby empowered to promulgate such rules not inconsistent with the provisions of this Chapter, as may, in its opinion, be necessary to carry out the provisions of the laws relating to banks and banking as herein defined, and as may be further necessary to insure safe and conservative management of the banks under its supervision taking into consideration the appropriate interest of the depositors, creditors, stockholders, and the public in their relations with such banks. All banks doing business under the provisions of this Chapter shall conduct their business in a manner consistent with all laws relating to banks and banking, and all rules, regulations, and instructions that may be promulgated or issued by the State Banking Commission. (1921, c. 4, s. 63; C.S., s. 222(a); 1931, c. 243, s. 5; 1939, c. 91, s. 2; 1945, c. 743, s. 1; 1979, c. 483, s. 10.)

Legal Periodicals. — For discussion of section, see 3 N.C.L. Rev. 81.

CASE NOTES

Cited in *Lenoir Fin. Co. v. Currie*, 254 N.C. 129, 118 S.E.2d 543 (1961); *Cooke v. Outland*, 265 N.C. 601, 144 S.E.2d 835 (1965).

§ 53-104.1. Examination of nonbanking affiliates.

The Commissioner of Banks, at his discretion, may examine the affiliates of a bank doing business under this Chapter to the extent it is necessary to safeguard the interest of depositors and creditors of the bank and of the general public, and to enforce the provisions of this Chapter. The Commissioner may conduct the examination in conjunction with any examination of the bank or affiliate conducted by any other state or federal regulatory authority. For the purpose of this section, the word "affiliate" means any bank holding company of which the bank is a subsidiary and any nonbanking subsidiary of that bank holding company, as "subsidiary" is defined by Section 2 of the Federal Bank Holding Company Act of 1956 (12 U.S.C. Sec. 1841(d), as amended). (1979, c. 483, s. 11.)

§ 53-105. Reports of condition.

Every bank shall make to the Commissioner of Banks not less than three reports during each year, according to the form which may be prescribed by said Commissioner of Banks; which report shall be verified by the oath or affirmation of the president, vice-president, cashier, secretary, or treasurer of said bank, and in addition thereto, two of the directors. Each such report shall exhibit in detail and under appropriate heads the resources, assets, and liabilities of such bank at the close of business on any past day by the Commissioner of Banks specified, and shall be transmitted to the Commissioner of Banks within 10 days after the receipt of a request or requisition therefor from the Commissioner of Banks; provided, however, the Commissioner of Banks may extend the time for a period not to exceed 30 days for any bank to transmit the reports heretofore required whenever in his judgment such extension is necessary; and in a form prescribed by the Commissioner of Banks; a summary of such report shall be published in a newspaper published in the place where the bank is located, or if there is no newspaper in the place, then in the nearest one published thereto in the county in which such bank is established. Proof of such publication shall be furnished the Commissioner of Banks in such form as may be prescribed by him. (1921, c. 4, s. 64; 1923, c. 148, s. 2; C.S., s. 222(b); 1931, c. 243, s. 5; 1979, c. 483, s. 12.)

§ 53-106. Special reports.

The Commissioner of Banks may call for special reports whenever in his judgment it is necessary to inform him of the condition of any bank, or to obtain a full and complete knowledge of its affairs. Said reports shall be in and according to the form prescribed by the Commissioner of Banks, and shall be verified in the manner provided in G.S. 53-105, and shall be published as therein provided, if required by the Commissioner of Banks so to be. The Commissioner of Banks may extend the time for filing special reports for a period not to exceed 30 days. (1921, c. 4, s. 66; C.S., s. 222(d); 1931, c. 243, s. 5; 1981, c. 671, s. 12.)

Effect of Amendments. — The 1981 amendment, effective July 1, 1981, added the last sentence.

§ 53-107. Penalty for failure to make report.

Every bank failing to make and transmit any report which the Commissioner of Banks is authorized to require by this Chapter, and in and according to the form prescribed by said Commissioner of Banks, within 10 days after the receipt of a request or requisition therefor, or within the extension of time granted by the Commissioner of Banks heretofore provided or failing to publish the reports as required, shall forthwith be notified by the Commissioner of Banks, and if such failure continue for five days after the receipt of such notice, such delinquent bank shall be subject to a penalty of two hundred dollars (\$200.00). The penalty herein provided for shall be recovered in a civil action in any court of competent jurisdiction, and it shall be the duty of the Attorney General to prosecute all such actions. (1921, c. 4, s. 67; C.S., s. 222(e); 1931, c. 243, s. 5; 1979, c. 483, s. 13.)

§ 53-108. List of stockholders to be kept.

Every bank doing business under this Chapter shall at all times keep a correct record of the names of all its stockholders and whenever called upon by the Commissioner of Banks or his duly authorized agent, make available for examination a correct list of all its stockholders, the resident address of each, and the number of shares held by each. Whenever the word "stockholders" is used in this section, the same shall be deemed to include, to the extent available, stockholders of any corporations which own ten percent (10%) or more of the capital stock of any bank doing business under this Chapter or a lesser amount when required by the Commissioner. (1921, c. 4, s. 68; C.S., s. 222(f); 1931, c. 243, s. 5; 1979, c. 483, s. 14.)

§ 53-109. Official communications of Commissioner of Banks.

Each official communication directed by the Commissioner of Banks, or any State bank examiner, to any bank, or to any officer thereof, relating to an examination or investigation conducted or made by the Commissioner of Banks, or containing suggestions or recommendations as to the conduct of the bank shall, if required by the authority submitting same, be submitted by the officer or director receiving it, to the executive committee or board of directors of such bank and duly noted in the minutes of such meeting. The receipt and submission of such notice to the executive committee or board of directors shall be certified to the Commissioner of Banks within such time as he may require, by three members of such committee or board. (1921, c. 4, s. 69; C.S., s. 222(g); 1931, c. 243, s. 5.)

§ 53-110. Banking Commission to prescribe books, records, etc.; retention, reproduction and disposition of records.

(a) Whenever in its judgment it may appear to be advisable, the State Banking Commission may issue such rules, instructions, and regulations prescribing the manner of keeping books, accounts, and records of banks as will tend to produce uniformity in the books, accounts, and records of banks of the same class.

(b) The following provisions shall be applicable to banks and trust companies operating under Chapter 53 of the General Statutes and amendments thereto, and to national banking associations insofar as this section does not contravene paramount federal law:

- (1) Each bank shall retain permanently the minute books of meetings of its stockholders and directors, its capital stock ledger and capital stock certificate ledger or stubs, and all records which the Banking Commission shall in accordance with the terms of this section require to be retained permanently.
- (2) All other bank records shall be retained for such periods as the Banking Commission shall in accordance with the terms of this section prescribe.
- (3) The Banking Commission shall from time to time issue regulations classifying all records kept by banks and prescribing the period for which records of each class shall be retained. Such periods may be permanent or for a lesser term of years. Such regulations may from time to time be amended or repealed, but any amendment or repeal shall not affect any action taken prior to such amendment or repeal. Prior to issuing any such regulations the Commission shall consider:

- a. Actions at law and administrative proceedings in which the production of bank records might be necessary or desirable;
 - b. State and federal statutes of limitation applicable to such actions or proceedings;
 - c. The availability of information contained in bank records from other sources; and
 - d. Such other matters as the Banking Commission shall deem pertinent in order that its regulation will require banks to retain their records for as short a period as is commensurate with the interest of bank customers and stockholders and of the people of this State in having bank records available.
- (4) Any bank may cause any or all records kept by it to be recorded, copied or reproduced by any photographic, photostatic or miniature photographic process which correctly, accurately, and permanently copies, reproduces or forms a medium for copying or reproducing the original record on a film or other durable material.
 - (5) Any such photographic, photostatic or miniature photographic copy or reproduction shall be deemed to be an original record for all purposes and shall be treated as an original record in all courts and administrative agencies for the purpose of its admissibility in evidence. A facsimile, exemplification or certified copy of any such photographic copy or reproduction shall, for all purposes, be deemed a facsimile, exemplification or certified copy of the original record.
 - (6) Any bank may dispose of any record which has been retained for the period prescribed by the Banking Commission or in accordance with the terms of this section for retention of records for its class. (1921, c. 4, s. 70; C.S., s. 222(h); 1931, c. 243, s. 5; 1939, c. 91, s. 2; 1951, c. 166, ss. 1, 2.)

§ 53-111. When reserve below legal requirement.

When the reserve of any bank falls below the amount required by law, it shall not make new loans or discounts, otherwise than by discounting or purchasing bills of exchange, payable at sight or on demand, nor make dividends of its profits until the reserve required by law is restored. The Commissioner of Banks shall require any bank whose reserve falls below the amount herein required immediately to make good such reserve. In case the bank fails for 30 days thereafter to make good its reserve the Commissioner of Banks may forthwith take possession of the property and business of such bank until its affairs be adjusted or finally liquidated as provided for in this Chapter. (1921, c. 4, s. 71; C.S., s. 222(i); 1931, c. 243, s. 5.)

Cross References. — As to definition of "reserve," see § 53-51. As to amount of reserve, see § 53-50.

CASE NOTES

Purpose. — The wisdom of this section and § 53-48 is manifest; banks, whose business is conducted in strict compliance therewith seldom become insolvent. *State v. Cooper*, 190 N.C. 528, 130 S.E. 180 (1925).

Criminal Liability of Bank's Officers. — A bank must act through its officers, and where they have violated the provisions of this section and § 53-48, as to lending the bank's money,

the offense is committed by the officers under the meaning of the statute, and they are individually indictable therefor. *State v. Cooper*, 190 N.C. 528, 130 S.E. 180 (1925).

Showing of Knowledge of Violation Is Sufficient for Conviction. — Where the official position of an officer of a bank is such as necessarily to acquaint him of the violation of the statute respecting the making of loans, and

to fix him as a party thereto, it is sufficient evidence to sustain his conviction of the misdemeanor prescribed by § 53-134. *State v. Cooper*, 190 N.C. 528, 130 S.E. 180 (1925).

Intent Not Element of Offense. — An intent to defraud the bank or others is not required to be either alleged in the indictment or proved upon the trial of the issue raised by a plea of not guilty. Neither the bank nor any of its officers or directors have any discretion as to the making of loans which are thus forbidden. Intent is, therefore, not an element of the crime. The willful doing of the unlawful act consti-

tutes the crime declared by § 53-134 to be a misdemeanor, punishable as such in the discretion of the court. *State v. Cooper*, 190 N.C. 528, 130 S.E. 180 (1925).

Consolidation of Indictments. — An indictment charging a bank officer of violating this section and also unlawfully making loans in violation of § 53-48, alleges the commission of crimes of the same class. Where there are two indictments thereof against the same person they may be consolidated and tried together by the court. *State v. Cooper*, 190 N.C. 528, 130 S.E. 180 (1925).

§ 53-112. Appraisal of assets of doubtful value.

If any assets of a bank are of a doubtful or disputed value, an appraisal of such assets may be had by the Commissioner of Banks, and for the purpose of making such appraisal the Commissioner of Banks shall designate one agent as an appraiser and the bank shall designate an agent as an appraiser and the two so chosen shall designate a third. The appraisers so selected shall make an appraisal of the assets so designated as doubtful or disputed and file a written report of their appraisal with the bank and with the Commissioner of Banks. In making such appraisal the appraisers shall determine the actual cash market value of such assets. Such appraisal, when made, shall be accepted as the value of such assets for the purpose of examination or for the purpose of determining the actual cash market value of such assets. The appraisers designated shall not be interested, in any way, either in the bank or as an employee of the Commissioner of Banks and all expenses of such appraisal shall be paid by the bank whose assets are appraised. If any bank required to appoint an appraiser hereunder shall fail for 10 days to appoint an appraiser, the Commissioner of Banks may apply to the clerk of the superior court of the county in which the bank is located for the appointment of such an appraiser, and the clerk shall thereupon make the appointment for the bank. (1927, c. 47, s. 13; 1931, c. 243, s. 5.)

§ 53-113. Certified copies of records as evidence.

In all civil actions in the courts of this State wherein are involved as evidence or otherwise any of the records of the Commissioner of Banks, a certified copy over the signature and under the seal of the Commissioner of Banks shall be admissible in evidence to the same effect as if produced in court at trial by the proper custodian of the records. (1927, c. 47, s. 14; 1931, c. 243, s. 5.)

§ 53-114. Other powers of State Banking Commission.

In addition to all other powers conferred upon and vested in the State Banking Commission, the said Commission, with the approval of the Governor, is hereby authorized, empowered and directed, whenever in its judgment the circumstances warrant it:

- (1) To authorize, permit, and/or direct and require all banking corporations under its supervision, to extend for such period and upon such terms as it deems necessary and expedient, payment of any demand and/or time deposits.
- (2) To direct, require or permit, upon such terms as it may deem advisable, the issuance of clearinghouse certificates or other evidences of claims against assets of such banking institutions.

- (3) To authorize and direct the creation, in such banking institutions, of special trust accounts for the receipt of new deposits, which deposits shall be subject to withdrawal on demand without any restriction or limitation and shall be kept separate in cash or on deposit in such banking institutions as it shall designate or invested in such obligations of the United States and/or the State of North Carolina as it shall designate.
- (4) To adopt for such banking institutions such regulations as are necessary in its discretion to enable such banking institutions to comply fully with the federal regulations prescribed for national or state banks. (1933, c. 120, s. 3; 1939, c. 91, s. 2.)

§ 53-115. State Banking Commission to make rules and regulations.

The State Banking Commission is hereby authorized, empowered and directed to make all necessary rules and regulations, and to give all necessary instructions with respect to such actions of banking corporations which the Commissioner of Banks may authorize, permit and/or direct and require to be conducted under the provisions of G.S. 53-77, 53-114, 53-115, and 53-116. And it shall be the duty of all such banking corporations and their officers, agents and employees, to comply fully with any and all such rules, regulations and instructions, established and promulgated by the State Banking Commission with respect to such banking corporations under the terms of G.S. 53-77, 53-114, 53-115, and 53-116; and such orders, rules, and regulations shall have the same force and effect as rules, regulations and instructions promulgated under the existing banking laws. (1933, c. 120, s. 4; 1939, c. 91, s. 2; 1979, c. 483, s. 15.)

§ 53-116. Commissioner need not take over banks failing to meet deposit demands.

The Commissioner of Banks is authorized and directed not to take possession of any banking corporation under his supervision for failure to meet its deposit liabilities during the period in which such banking corporation is operating under the terms of G.S. 53-114, subdivision (1); and he is hereby relieved from any and all liability for permitting such banking corporations to continue operations under the terms thereof. (1933, c. 120, s. 5.)

ARTICLE 9.

Bank Examiners.

§ 53-117. Appointment by Commissioner of Banks; examination of banks.

(a) The Commissioner of Banks, for the purpose of carrying out the provisions of this Chapter, shall appoint from time to time such State bank examiners, assistant State bank examiners, clerks and stenographers as may be necessary to examine the affairs of every bank doing business under this Chapter as often as the Commissioner of Banks shall deem necessary, and at least once every year; but the Commissioner may extend this period to 18 months when, in his opinion, an emergency condition exists that necessitates such action. The Commissioner of Banks may, at any time, remove any person appointed by him under this Chapter.

(b) The State Banking Commission shall adopt rules and regulations to implement the provisions of this Chapter, prescribing the nature and scope of examination of banks.

(c) The Commissioner of Banks is authorized to accept, in his discretion, as a part of a bank examination, reports on audits conducted in accordance with generally accepted auditing standards by independent accountants, when such reports contain an opinion by the independent accountant on the fairness of presentation of the financial statements and present information required by the rules and regulations of the State Banking Commission. No report of an audit of any bank shall be acceptable under this subsection if such audit was made by a person, firm or corporation who is a director, officer or employee of a bank or has a financial interest, other than as a depositor or obligor upon a fully collateralized loan, in the bank which is the subject of the audit.

(d) In the case of a bank which is a member of the Federal Reserve System or in the case of a bank whose deposits are insured by the Federal Deposit Insurance Corporation, the Commissioner of Banks is authorized to accept, in his discretion, as a part of the examinations prescribed in subsection (b) of this section, examinations and reports made pursuant to the Federal Reserve Act or the Federal Deposit Insurance Corporation Act. (1921, c. 4, s. 72; C. S., s. 223(a); 1931, c. 243, s. 5; 1967, c. 789, s. 17; 1977, c. 684, s. 1; 1977, 2nd Sess., c. 1181, s. 1.)

CASE NOTES

For manner in which former Corporation Commission took charge through examination, see *Taylor v. Everett*, 188 N.C. 247, 124 S.E. 316 (1924).

§ 53-118. Duties and powers.

It shall be the duty of the examiners to verify all reports made to the Commissioner of Banks by the officers and directors, members, or individuals conducting any banking institution, as required by this Chapter or by the Commissioner of Banks. The officers of every bank shall submit and surrender its books, assets, papers, and concerns to the examiners appointed under this Chapter, who shall retain the custody and possession of such books, assets, papers, and concerns for such length of time as may be required for the purpose of making an examination as required by this Chapter. If any officer shall refuse to surrender the books, assets, papers, and concerns as herein provided, or shall refuse to be examined under oath touching the affairs of such bank, the Commissioner of Banks may forthwith take possession of the property and business of the bank and liquidate its affairs in accordance with the provisions of this Chapter. (1921, c. 4, s. 73; C. S., s. 223(b); 1931, c. 243, s. 5.)

§ 53-119. Removal of officers and employees.

The Commissioner of Banks shall have the right, and is hereby empowered, to require the immediate removal from office of any officer, director, or employee of any bank doing business under this Chapter, who shall be found to be dishonest, incompetent, or reckless in the management of the affairs of the bank, or who persistently violates the laws of this State or the lawful orders, instructions, and regulations issued by the State Banking Commission. (1921, c. 4, s. 74; C.S., s. 223(c); 1931, c. 243, s. 5; 1939, c. 91, s. 2.)

§ 53-120. Examiners may administer oaths; summoning witnesses.

For the purpose of making examinations as required by this Chapter, any duly appointed examiner may administer oaths to examine any officer, director, agent, employee, customer, depositor, shareholder of such bank, or any other person or persons, touching its affairs and business. Any examiner may summon in writing any officer, director, agent, employee, customer, depositor, shareholder, or any person or persons resident of this State to appear before him and testify in relation thereto. (1921, c. 4, s. 75; C.S., s. 223(d).)

§ 53-121. Examiners may make arrest.

When it shall appear to any examiner, by examination or otherwise, that any officer, agent, employee, director, stockholder, or owner of any bank has been guilty of a violation of the criminal laws of this State relating to banks, it shall be his duty, and he is hereby empowered to hold and detain such person or persons until a warrant can be procured for his arrest; and for such purposes such examiners shall have and possess all the powers of peace officers of such county, and may make arrest without warrant for past offenses. Upon report of his action to the Commissioner of Banks, said Commissioner may direct the release of the person or persons so held, or, if in his judgment such person or persons should be prosecuted, the Commissioner of Banks shall cause the district attorney of the judicial district in which such detention is had to be promptly notified, and the action against such person or persons shall be continued a reasonable time to enable the district attorney to be present at the trial. (1921, c. 4, s. 76; C.S., s. 223(e); 1931, c. 243, s. 5; 1973, c. 47, s. 2.)

Legal Periodicals. — For discussion of section, see 15 N.C.L. Rev. 101.

CASE NOTES

Stated in *Alexander v. Lindsey*, 230 N.C. 663, 55 S.E.2d 470 (1949).

§ 53-122. Fees for examinations and other services.

For the purpose of paying the salaries and necessary traveling expenses of the Commissioner of Banks, State bank examiners, assistant State bank examiners, clerks, stenographers and other employees of the Commissioner of Banks, the following fees shall be paid into the office of the Commissioner of Banks:

- (1) Each bank and each branch of any bank which under the laws of the State of North Carolina is subject to supervision and examination by the Commissioner of Banks and is authorized to do business or is in process of voluntary liquidation, shall, within 10 days after the assessment has been made, pay into the office of the Commissioner of Banks according to its total resources as shown by its report of condition made to the Commissioner of Banks at the close of business December 31, 1978, and on the thirty-first day of December, or the date most nearly approximating same of each year thereafter on which a report of condition is made to the Commissioner of Banks not in excess of the following fees for its annual examination: eighty-five dollars (\$85.00) for the first one hundred thousand dollars (\$100,000) of assets or less, twelve dollars (\$12.00) for each one hundred thousand

dollars (\$100,000) or fraction in excess thereof, and three dollars and fifty cents (\$3.50) for each one hundred thousand dollars (\$100,000) or fraction thereof of trust assets, which said trust assets shall not include real estate carried as such; provided, however, with respect to loan agencies or brokers subject to the provisions of Article 15 of Chapter 53 of the General Statutes, the fee shall be one hundred seventy dollars (\$170.00) for the first one hundred thousand dollars (\$100,000) of assets or less, and twelve dollars (\$12.00) for each one hundred thousand dollars (\$100,000) or fraction in excess thereof.

- (2) All examinations made other than those provided for in subdivision (1) hereof shall be deemed special examinations and for such special examination the bank shall pay into the office of the Commissioner of Banks the following fees for each special examination: eighty-five dollars (\$85.00) for the first one hundred thousand dollars (\$100,000) of assets or less, twelve dollars (\$12.00) for each one hundred thousand dollars (\$100,000) or fraction in excess thereof, and three dollars and fifty cents (\$3.50) for each one hundred thousand dollars (\$100,000) or fraction thereof of trust assets, which said trust assets shall not include real estate carried as such; provided, however, with respect to loan agencies or brokers subject to the provisions of Article 15 of Chapter 53 of the General Statutes, the fee shall be one hundred seventy dollars (\$170.00) for the first one hundred thousand dollars (\$100,000) of assets or less, and twelve dollars (\$12.00) for each one hundred thousand dollars (\$100,000) or fraction in excess thereof. The fees paid for special examination shall be based on the assets of the bank examined as of the date of such examination.
- (3) The Commissioner of Banks may require reimbursement for all costs and expenses incurred in providing services other than examination for any bank or any licensee under Article 15 of this Chapter.
- (4) In all criminal cases tried in any of the courts of this State wherein any of the employees of the Commissioner of Banks are used as witnesses, a fee of ten dollars (\$10.00) per day and actual expenses incurred shall be allowed such witnesses and the same shall be paid to the Commissioner of Banks by the clerk of the court of the county in which the case is tried and thereafter charged in bill of costs as are other costs incurred in the trial; and in all civil actions tried in any of the courts of this State, wherein any of the employees of the Commissioner of Banks are required as witnesses, the party requiring such employee as witness shall deposit with the Commissioner of Banks when the subpoena is served a sufficient sum to cover the witness fee of ten dollars (\$10.00) per day and expenses, and such sums as may thus be advanced shall thereafter be charged in the bill of costs as other costs are charged.

All sums paid under this subdivision shall be paid to the Commissioner of Banks as are fees for examination and used in like manner.

- (5) The total compensation and necessary traveling expenses of the employees of the Commissioner of Banks shall not in any one year exceed the total fees collected under the provisions of this section, provided such expenses and compensation may exceed the total fees collected in any year when surplus funds are available.
- (6) In the first half of each calendar year, the State Banking Commission shall review the estimated cost of maintaining the office of the Commissioner of Banks for the next fiscal year. If the estimated fees provided for under subdivisions (1) and (2) shall exceed the estimated cost of maintaining the office of the Commissioner of Banks for the next fiscal year, then the State Banking Commission may reduce by uniform percentage the fees provided for in subdivisions (1) and (2) of

this section but not in a percentage greater than fifty percent (50%) nor to an amount which will reduce the amount of the fees to be collected below the estimated cost of maintaining the office of the Commissioner of Banks for the next fiscal year. If the estimated fees provided for under subdivisions (1) and (2) shall be less than the estimated cost of maintaining the office of the Commissioner of Banks for the next fiscal year, then the State Banking Commission may increase by uniform percentage the fees provided for in subdivisions (1) and (2) of this section to an amount which will increase the amount of the fees to be collected to an amount at least equal to the estimated cost of maintaining the office of the Commissioner of Banks for the next fiscal year. Such fees shall be reduced whenever a surplus exists which exceeds the estimated cost of operating the office of the Commissioner of Banks for one year, even if such reduction shall result in the collection of a smaller sum than the estimated cost of maintaining the office of the Commissioner of Banks for that year. In no event shall any surplus at the end of any fiscal year resulting from the collection of fees pursuant to this section revert to the general fund. (1921, c. 4, s. 77; C. S., s. 223(f); 1927, c. 47, s. 15; 1931, c. 243, s. 5; 1943, c. 733; 1945, c. 467; 1955, c. 640, ss. 1, 2; 1957, c. 1443, s. 1; 1969, c. 229; 1979, c. 483, s. 1; 1981, c. 671, s. 13.)

Effect of Amendments. — The 1981 amendment, effective July 1, 1981, rewrote subdivision (3), which formerly read: "For services

for any bank other than examination, the Commissioner of Banks may make such charge as in his opinion is fair and just."

CASE NOTES

Cited in Northcutt v. Clayton, 269 N.C. 428, 152 S.E.2d 471 (1967).

§ 53-123. Examiners shall make report.

Examiners shall make a full and detailed report in writing to the Commissioner of Banks of the condition of each bank within 10 days after each and every examination made by them. (1921, c. 4, s. 78; C. S., s. 223(g); 1931, c. 243, s. 5.)

ARTICLE 10.

Penalties.

§ 53-124. Examiner making false report.

If any bank examiner shall knowingly and willfully make any false or fraudulent report of the condition of any bank, which shall have been examined by him, with the intent to aid or abet the officers, owners, or agents of such bank in continuing to operate an insolvent bank, or if any such examiner shall keep or accept any bribe or gratuity given for the purpose of inducing him not to file any report of examination of any bank made by him, or shall neglect to make an examination of any bank by reason of having received or accepted any bribe or gratuity, he shall be guilty of a felony, and on conviction thereof shall be imprisoned in the State prison for not less than four months nor more than 10 years. (1921, c. 4, s. 79; C.S., s. 224(a).)

Cross References. — As to malfeasance of corporation officers and agents, see § 14-254. For identical section, see § 14-233.

§ 53-125. Examiners disclosing confidential information.

If any bank examiner or other employee of the Commissioner of Banks fails to keep secret the facts and information obtained in the course of an examination of a bank, except when the public duty of such examiner or employee requires him to report upon or take official action regarding the affairs of such bank, he shall be guilty of a misdemeanor, and upon conviction thereof shall be fined not more than five hundred dollars (\$500.00) or imprisoned not more than 12 months, or both, in the discretion of the court. Nothing in this section shall prevent the proper exchange of information with the representatives of the banking departments of other states, with the federal reserve bank or national bank examiners, or other authorities, with the creditors of such bank or others with whom a proper exchange of information is wise or necessary, or with the clearinghouse officials and examiners. (1921, c. 4, s. 80; C.S., s. 224(b); 1931, c. 243, s. 5.)

§ 53-126. Loans or gratuities forbidden.

No State bank, or any officer, director or employee thereof shall hereafter make any loan or grant any gratuity to the Commissioner of Banks, any bank examiner or assistant bank examiner of the Commissioner of Banks of North Carolina. Any such officer, director or employee violating this provision shall be guilty of a misdemeanor and imprisoned not exceeding one year or fined not more than one thousand dollars (\$1,000), or both; and they may be fined a further sum equal to the money so loaned or gratuity given. If the Commissioner of Banks, or any bank examiner, or assistant bank examiner of the Commissioner of Banks of North Carolina shall accept a loan or gratuity from any State bank, or from any officer, director or employee thereof, he shall be guilty of a misdemeanor and imprisoned not exceeding one year, or fined not more than one thousand dollars (\$1,000), or both, and may be fined a further sum equal to the money so loaned or gratuity given. (1927, c. 29, s. 1; 1931, c. 243, s. 5.)

§ 53-127. Use of "bank," "banking," or "trust" in corporate name.

No corporation shall hereafter be chartered under the laws of this State with the words "bank," "banking," or "trust" as a part of its name except corporations reporting to and under the supervision of the Commissioner of Banks, or corporations under the supervision of the Commissioner of Insurance; nor shall any corporate name be amended so as to include the words "bank," "banking," "banker," or "trust," unless the corporation be under such supervision. No person, association, firm or corporation domiciled within the State of North Carolina except corporations, persons, associations, or firms reporting to and under the supervision of the Commissioner of Banks or under the supervision of the Commissioner of Insurance, shall therein advertise or put forth any sign as bank, banking, banker or trust company, or use the word "bank," "banking," "banker," or "trust," as a part of its name and title, or in any way solicit or receive deposits or transact business as a trust company: Provided, that this Chapter shall not be held to prevent any individual as such from acting in any trust capacity as heretofore: Provided, further, that it shall be lawful for any corporation incorporated prior to January 1, 1905, to retain the word "trust" in the name of said corporation, though it does not transact a banking business

or such other business as requires its examination by the Commissioner of Banks or the Commissioner of Insurance.

Any violation of the provisions of this section shall be a misdemeanor, and upon conviction thereof the offender shall be fined in a sum not exceeding five hundred dollars (\$500.00) for each offense. (1921, c. 4, s. 81; C.S., s. 224(c); 1931, c. 243, s. 5; 1943, c. 543.)

§ 53-128. Willfully and maliciously making derogatory reports.

Any person who shall willfully and maliciously make, circulate, or transmit to another or others any statement, rumor, or suggestion, written, printed, or by word of mouth, which is directly or by inference derogatory to the financial condition, or affects the solvency or financial standing of any bank, or who shall counsel, aid, procure, or induce another to state, transmit, or circulate any such statement or rumor shall be guilty of a misdemeanor, and upon conviction thereof shall be fined or imprisoned, or both, in the discretion of the court. (1921, c. 4, s. 82; C.S., s. 224(d).)

§ 53-129. Misapplication, embezzlement of funds, etc.

Whoever being an officer, employee, agent or director of a bank, with intent to defraud or injure the bank, or any person or corporation, or to deceive an officer of the bank or an agent appointed to examine the affairs of such bank, embezzles, abstracts, or misapplies any of the money, funds, credit or property of such bank, whether owned by it or held in trust, or who, with such intent, willfully and fraudulently issues or puts forth a certificate of deposit, draws an order or bill of exchange, makes an acceptance, assigns a note, bond, draft, bill of exchange, mortgage, judgment, decree or fictitiously borrows or solicits, obtains or receives money for a bank not in good faith, intended to become the property of such bank; or whoever being an officer, employee, agent, or director of a bank, makes or permits the making of a false statement or certificate, as to a deposit, trust fund or contract, or makes or permits to be made a false entry in a book, report, statement or record of such bank, or conceals or permits to be concealed by any means or manner, the true and correct entries of said bank, or its true and correct transactions, who knowingly loans, or permits to be loaned, the funds or credit of any bank to any insolvent company or corporation, or corporation which has ceased to exist, or which never had any existence, or upon collateral consisting of stocks or bonds of such company or corporation, or who makes or publishes or knowingly permits to be made or published a false report, statement or certificate as to the true financial condition of such bank, shall be punished as a Class E felon. (1921, c. 4, s. 83; C.S., s. 224(e); 1927, c. 47, s. 16; 1979, c. 760, s. 5.)

Cross References. — For statute providing the punishment for felonies, see § 14-1.1.

Effect of Amendments. — The 1979 amendment, effective July 1, 1981, substituted "punished as a Class E felon" for "guilty of a felony and upon conviction thereof shall be fined not more than ten thousand dollars (\$10,000) or imprisoned in the State's prison not more than 30 years, or both" at the end of the section. The 1979 amendatory act was originally made effective July 1, 1980. It was postponed to March 1,

1981, by Session Laws 1979, 2nd Sess., c. 1316; to April 15, 1981, by Session Laws 1981, c. 63; and to July 1, 1981, by Session Laws 1981, c. 179.

Session Laws 1979, c. 760, s. 6, as amended by Session Laws 1979, 2nd Sess., c. 1316, s. 47; 1981, c. 63, s. 1; and 1981, c. 179, s. 14, provides: "This act shall become effective on July 1, 1981, and shall apply only to offenses committed on or after that date, unless specific language of the act indicates otherwise."

CASE NOTES

Intent and purpose of this section is to prevent the deception of the officers of a bank or the depletion of its assets or injury of its business by falsification of the bank's books by its officers or employees, and an indictment for the offense is not sufficient which merely charges such falsification without showing that the false entries were material or affected the interests of the bank or deceived its officers. *State v. Cole*, 202 N.C. 592, 163 S.E. 594 (1932).

Section 14-254 Not in Conflict. — Section 14-254, making it a criminal offense for the cashier or certain other officers, agents and employees of a bank to be guilty of malfeasance in the respects therein enumerated, making the intent necessary for a conviction, is not in conflict with this section as passed in 1921. *State v. Switzer*, 187 N.C. 88, 121 S.E. 43 (1924).

"Abstract" Construed. — The legal meaning of the word "abstract," as it appears in § 14-254, with reference to the unlawful use of the funds of the bank, is correctly charged under an instruction to the jury defining it as the taking from or withdrawing from the bank, with the intent to injure or defraud. *State v. Switzer*, 187 N.C. 88, 121 S.E. 43 (1924).

"Embezzle" means misappropriate as well as to convert to one's own use. *State v. Maslin*, 195 N.C. 537, 143 S.E. 3 (1928), overruled on other grounds, *State v. Williams*, 279 N.C. 663, 185 S.E.2d 174 (1971).

Specific intent to deceive or to defraud is not necessary to a conviction of a bank officer or employee of making false entries on the books of the bank under the provisions of this section, it being sufficient if the defendant willfully made such false entries, the performance of the act expressly forbidden by statute constituting an offense in itself without regard to the question of specific intent. *State v. Lattimore*, 201 N.C. 32, 158 S.E. 741 (1931).

Indictment Charging Conspiracy to Violate Section. — It is not necessary for an indictment, charging a conspiracy to violate the provisions of this section, to allege that all of the defendants were officers or employees of the bank, the indictment being sufficient if it alleges that some of the defendants were officers or employees of the bank and that the other defendants conspired with them to do the unlawful act. *State v. Davis*, 203 N.C. 13, 35, 164 S.E. 737, cert. denied, 287 U.S. 649, 53 S.Ct. 95, 77 L.Ed. 561 (1932).

Alleging Corporation Is a Bank. — Where the indictment charges the employee with making false entries upon the books of the bank in which he was employed, and that it was a corporation existing under the laws of the State of North Carolina, it is not defective for failing to particularize that it was a bank, within the

contemplation of the statute under which the indictment had been drawn. *State v. Hedgecock*, 185 N.C. 714, 117 S.E. 47 (1923).

Sufficiency of Indictment. — In a prosecution under this section and § 14-254 it was not necessary to aver or to prove that the money or funds had been committed by the bank to the custody of the defendant or that there had been any breach of trust or confidence except that which arose out of the relation between the bank and the defendant. Nor was it necessary to charge in the very words that the defendant had converted the property to his own use. The words "did embezzle" sufficiently indicated the criminal act. The intent to defraud was sufficiently set out, under § 15-151, without specifically naming any particular victim of the preconceived purpose. And the indictment was sufficient though there was nothing to indicate the number of abstractions, if more than one. *State v. Maslin*, 195 N.C. 537, 143 S.E. 3 (1928), overruled on other grounds, *State v. Williams*, 279 N.C. 663, 185 S.E.2d 174 (1971).

Variance as to Some Items. — In a prosecution of an officer of a bank for publishing a false report of the bank's condition in violation of this section, a variance between the allegations and proof as to some of the items of the report will not be fatal when there is no variance with respect to all the items, it being sufficient for conviction if the report as published was false in any particular as alleged in the indictment and was published with knowledge of such falsity and with a wrongful or unlawful intent. *State v. Davis*, 203 N.C. 47, 164 S.E. 732, cert. denied, 287 U.S. 645, 53 S.Ct. 91, 77 L.Ed. 558 (1932).

Expert Evidence as to Book Entries. — In a prosecution under this section and § 14-254 expert parol evidence may be properly admitted to trace book entries, without contradicting them, so as to show that the officer of the bank had embezzled the bank's funds held in trust, as charged in the bill of indictment. In such case there was no invasion of the province of the jury by the expression of an opinion upon a fact in issue. *State v. Maslin*, 195 N.C. 537, 143 S.E. 3 (1928), overruled on other grounds, *State v. Williams*, 279 N.C. 663, 185 S.E.2d 174 (1971).

Instruction That Willfulness Must Be Shown Is Not Error. — In a prosecution under this section for willfully making false entries on the books of a bank, an instruction which was intended to stress and in effect did stress the necessity of proving that the false entries were willfully and not inadvertently made, will not be held for error. *State v. Lattimore*, 201 N.C. 32, 158 S.E. 741 (1931).

Conviction of Depositor. — In order to convict a depositor of a bank who has abstracted funds from the bank in collusion with its

cashier, it is not required that he himself was an officer of the bank or that he was present at the time the money was feloniously "abstracted," under the provisions of § 14-254, and he may be convicted thereunder when the bill of indictment substantially follows the language of the statute and the evidence is sufficient to sustain the charge therein. This is not

applicable to the provisions of this section as passed in 1921. *State v. Switzer*, 187 N.C. 88, 121 S.E. 43 (1924).

Though the depositor was not present at the time the offense was committed, he may be convicted as a principal under the counts of the indictment so charging the offense. *State v. Switzer*, 187 N.C. 88, 121 S.E. 43 (1924).

§ 53-130. Making false entries in banking accounts; misrepresenting assets and liabilities of banks.

If any person shall willfully and knowingly subscribe to, or make, or cause to be made, any false statement or false entry in the books of any bank, or shall knowingly subscribe to or exhibit false papers, with intent to deceive any person authorized to examine into the affairs of such bank, or shall willfully and knowingly make, state or publish any false statement of the amount of the assets or liabilities of any bank, he shall be guilty of a felony, and upon conviction thereof shall be imprisoned in the State's prison not less than four months nor more than 10 years. (1903, c. 275, s. 27; Rev., s. 3326; C.S., s. 4402.)

§ 53-131. False certification of a check.

Whoever, being an officer, employee, agent, or director of a bank, certifies a check drawn on such bank, and willfully fails to forthwith charge the amount thereof against the account of the drawer thereof, or willfully certifies a check drawn on such bank unless the drawer of such check has on deposit with the bank an amount of money subject to the payment of such check and equivalent to the amount therein specified, shall be guilty of a felony, and upon conviction shall be fined not more than five thousand dollars (\$5,000) or imprisoned in the State prison for not more than five years, or both. (1921, c. 4, s. 84; C.S., s. 224(f).)

§ 53-132. Receiving deposits in insolvent banks.

Any person, being an officer or employee of a bank, who receives, or being an officer thereof, permits an employee to receive money, checks, drafts, or other property as a deposit therein when he has knowledge that such bank is insolvent, shall be guilty of a felony, and upon conviction thereof shall be fined not more than five thousand dollars (\$5,000) or imprisoned in the State prison not more than five years, or both. Provided, that in any indictment hereunder, insolvency shall not be deemed to include insolvency as defined under paragraph d of subdivision (3) in the definition of insolvency under G.S. 53-1. (1921, c. 4, s. 85; C.S., s. 224(g); 1927, c. 47, s. 17.)

CASE NOTES

"Insolvent" Defined. — The word "insolvent," in this section, means when the bank cannot meet its depository liabilities in due course, and does not require that the condition of the bank should at the time be such as to enable it at any given time to pay all of its depositors in full at the time on demand. *State v. Hightower*, 187 N.C. 300, 121 S.E. 616 (1924).

A bank is insolvent, within the meaning of this section, when the actual cash market value of its assets is not sufficient to pay its liabilities to its depositors and other creditors. *State v. Brewer*, 202 N.C. 187, 162 S.E. 363 (1932).

"Knowledge" Defined. — The word "knowledge," as used in the statute, is to be taken in its ordinary sense and according to its usual significance or acceptance. It means an

impression of the mind, the state of being aware; and this may be acquired in numerous ways and from many sources. It is usually obtained from a variety of facts and circumstances. Generally speaking, when it is said a person has knowledge of a given condition, it is meant that his relation to it, his association with it, his control over it, and his direction of it are such as to give him actual information concerning it. *State v. Hightower*, 187 N.C. 300, 121 S.E. 616 (1924).

Who May Bring Action for Civil Liability.

— A violation of this section by an employee, or by officers and directors of a bank, resulting in damages to a depositor, is a wrong to the depositor; he and not the bank or its receiver is entitled to maintain an action to recover the damages resulting from such wrong. See *Townsend v. Williams*, 117 N.C. 330, 23 S.E. 461 (1895); *Tate v. Bates*, 118 N.C. 287, 24 S.E. 482 (1896); *Solomon v. Bates*, 118 N.C. 311, 24 S.E. 478, motion to modify opinion dismissed, 118 N.C. 321, 24 S.E. 746 (1896); *Houston v. Thornton*, 122 N.C. 365, 29 S.E. 827 (1898); *State v. Hightower*, 187 N.C. 300, 121 S.E. 616 (1924); *Russell v. Boone*, 188 N.C. 830, 125 S.E. 926 (1924); *Bane v. Powell*, 192 N.C. 387, 135 S.E. 118 (1926).

A depositor in a bank, who has sustained damages, peculiar to himself, by the wrongful act of the officers and directors of the bank, has a right to recover damages in an action brought by him against the officers and directors. *Douglass v. Dawson*, 190 N.C. 458, 130 S.E. 195 (1924); *Bane v. Powell*, 192 N.C. 387, 135 S.E. 118 (1926).

Liability Not Bank Asset. — Sums for which bank officers and directors are liable for receiving or permitting receipt of deposit with knowledge of bank's insolvency, contrary to this section, are not assets of the bank. The wrong being only to the depositor, he need not allege, to maintain an action, that bank's receiver refused to sue on demand. *Bane v. Powell*, 192 N.C. 387, 135 S.E. 118 (1926).

Elements of Offense. — In order for a conviction under the provisions of this section, the State must prove beyond a reasonable doubt the actual receipt of the deposits by defendant officer of the bank at the time when the bank was insolvent to his own knowledge, or that such officer permitted an employee of the bank to receive the deposits with knowledge of these facts. *State v. Hightower*, 187 N.C. 300, 121 S.E. 616 (1924).

Necessary Allegations. — In order for a depositor to maintain an action against the individual officers of an insolvent bank for permitting the deposits to be received it is nec-

essary, among other things, to allege and prove the insolvency of the bank at the time the deposits were made, and the allegation that it was either insolvent then or the misconduct of the officials afterwards caused its insolvency, is insufficient, the alternative of the allegation being a wrong to the bank itself which may be sued upon by its receiver afterwards. *Wall v. Howard*, 194 N.C. 310, 139 S.E. 449 (1927).

Evidence of Value of Assets and Property. — For the purpose of ascertaining the solvency or insolvency of a bank, it is permissible to go into an investigation of its assets and property as of the date when the deposit was made, and, of course, their value after that, or at the time of the trial, is competent as illustrating or bearing upon their worth at the time the deposit was charged to have been received. *State v. Hightower*, 187 N.C. 300, 121 S.E. 616 (1924).

Evidence of Admissions of Knowledge of Insolvency. — Upon the trial of an officer of an insolvent bank under this section, the officer's admissions that he knew of the insolvency of the bank at the time in question with his explanation thereof is competent testimony. *State v. Brewer*, 202 N.C. 187, 162 S.E. 363 (1932).

Bank Examiner as Expert Witness. — In an action to convict an officer of a bank under this section, the testimony of the State bank examiner is to be received as that of an expert upon the question of the bank's insolvency. *State v. Hightower*, 187 N.C. 300, 121 S.E. 616 (1924).

Certified Accountant as Witness. — Upon the trial of a bank official under the provisions of this section, testimony of a certified public accountant who had had experience in such matters and who had examined the books of the bank and had obtained from the directors, collectively and individually, information as to the value of its assets including lands and collateral, that the bank was insolvent at the time in question is not objectionable. *State v. Brewer*, 202 N.C. 187, 162 S.E. 363 (1932).

Sufficiency of Expert Opinion Evidence as to Insolvency. — Where the State bank examiner and another expert have been permitted to give their testimony as to the bank's insolvency at the time of the crime, upon their investigation, without stating the basis of their opinions thereon, it may not be decided as a matter of law, upon conflicting evidence, that the defendant must have known of the insolvent condition testified to by the experts. *State v. Hightower*, 187 N.C. 300, 121 S.E. 616 (1924).

§ 53-133. Advertising larger amount than that paid in capital stock.

It shall be unlawful for any bank to advertise in a newspaper, letterhead, or any other way, a larger capital stock than has been actually paid in in cash. Any bank violating this section shall be subject to a penalty of five hundred dollars (\$500.00) for each and every offense. The penalty herein provided for shall be recovered by the State in a civil action in any court of competent jurisdiction, and it shall be the duty of the Attorney General to prosecute all such actions. (1921, c. 4, s. 86; C.S., s. 224(h).)

§ 53-134. Offenses declared misdemeanors; prosecution; employment of counsel; punishment.

Any offense against the banking laws of the State of North Carolina which is not elsewhere specifically declared to be a crime, or for which elsewhere a penalty is not specifically provided, is hereby declared to be a misdemeanor, and shall be punishable at the discretion of the court. The Commissioner of Banks is authorized and directed to prosecute all offenses against the banking laws of the State, and to that end is expressly authorized to employ counsel to prosecute in the inferior courts and to aid the district attorney in the superior courts. The Auditor of the State shall, upon the certificate of the Commissioner of Banks, accompanied by an itemized statement of the account, draw his warrant upon the State Treasurer to compensate the counsel so employed, and the State Treasurer shall pay the same out of the funds in the treasury and not otherwise appropriated. (Ex. Sess. 1921, c. 56, s. 4; C.S., s. 224(i); 1927, c. 47, s. 18; 1931, c. 243, s. 5; 1973, c. 47, s. 2.)

CASE NOTES

Loans in Violation of § 53-48 or § 53-111. — Under this section, the unlawful act of making loans in violation of § 53-48 or § 53-111 is made a misdemeanor, and is punishable as such at the discretion of the court. *State v. Cooper*, 190 N.C. 528, 130 S.E. 180 (1925). See notes to §§ 53-48 and 53-111.

§ 53-135. General corporation law to apply.

All provisions of the law relating to private corporations, and particularly those enumerated in the Chapter entitled "Corporations," not inconsistent with this Chapter or with the business of banking, shall be applicable to banks. (1921, c. 4, s. 87; C.S., s. 224(j).)

CASE NOTES

Quoted in *Cooke v. Outland*, 265 N.C. 601, 144 S.E.2d 835 (1965).

Cited in *Cole v. Farmers Bank & Trust Co.*, 221 N.C. 249, 20 S.E.2d 54 (1942).

ARTICLE 11.

*Industrial Banks.***§ 53-136. Industrial bank defined.**

The term "industrial bank," as used in this Article shall be construed to mean any corporation organized or authorized under this Article which is engaged in receiving, soliciting or accepting money or its equivalent on deposit and in lending money to be repaid in weekly, monthly, or other periodical installments or principal sums as a business: Provided, however, this definition shall not be construed to include building and loan associations, commercial banks, or credit unions. (1923, c. 225, s. 1; C.S., s. 225(a); 1945, c. 743, s. 1.)

§ 53-137. Manner of organization.

Any number of persons, not less than five, may organize an industrial bank by setting forth in a certificate of incorporation, under their hands and seals, the following:

- (1) The name of the industrial bank.
- (2) The location of its principal office in this State.
- (3) The nature of its business.
- (4) The amount of its authorized capital stock which shall be divided into shares of ten (\$10.00), twenty (\$20.00), twenty-five (\$25.00), fifty (\$50.00) or one hundred dollars (\$100.00) each: Provided, fractional shares may be issued for the purpose of complying with the requirements of G.S. 53-88.
- (5) The names and post-office addresses of subscribers for stock, and the number of shares subscribed by each. The aggregate of such subscription shall be the amount of the capital with which the industrial bank will begin business.
- (6) Period, if any, limited for the duration of the industrial bank.

This section shall not apply to banks organized and doing business prior to the adoption of this section. (1923, c. 225, s. 2; C.S., s. 225(b); 1945, c. 743, s. 1.)

CASE NOTES

Denial of Charter Upheld Absent Capricious Acts, Bad Faith or Disregard of Law.

— Where plaintiffs applied for an industrial bank charter, and their application was not passed upon by the Secretary of State on the advice and recommendation of the Commissioner of Banks, acting in accordance with § 53-4, and plaintiffs sued to compel the issu-

ance of a charter, alleging no capricious acts, bad faith or disregard of law by the State officers, the complaint did not state a cause of action and was not sufficient as a petition for certiorari or as an application for mandamus. *Pue v. Hood*, 222 N.C. 310, 22 S.E.2d 896 (1942).

§ 53-138. Corporate title.

Every corporation incorporated or reorganized pursuant to the provisions of this Article shall be known as an industrial bank, and may use the word "bank" as part of its corporate title. (1923, c. 225, s. 3; C.S., s. 225(c).)

§ 53-139. Capital stock.

The amount of capital stock with which any industrial bank shall commence business shall not be less than fifty percent (50%) of that which would be required of a commercial bank under the provisions of G.S. 53-2. (1923, c. 225, s. 4; C.S., s. 225(d); 1967, c. 789, s. 18.)

§ 53-140. Sales of capital stock; accounting; fees.

The capital stock sold by any industrial bank in process of organization, or for an increase of the capital stock, shall be accounted for to the bank in the full amount paid for the same. No commission or fee shall be paid to any person, association, or corporation for selling such stock. The Commissioner of Banks shall refuse authority to commence business to any industrial bank where commissions or fees have been paid, or have been contracted to be paid by it, or by anyone in its behalf to any person, association, or corporation for securing subscriptions for or selling stock in such bank. (1923, c. 225, s. 5; C.S., s. 225(e); 1931, c. 243, s. 5.)

§ 53-141. Powers.

Industrial banks shall have the powers conferred by paragraphs 1, 2, 3, 5 and 7 of G.S. 55-17 [subdivisions (1), (2), (3), (5) and (7) of subsection (a) of G.S. 55-17], and subdivision (3) of G.S. 53-43, such additional powers as may be necessary or incidental for the carrying out of their corporate purposes, and in addition thereto the following powers:

- (1) To discount and negotiate promissory notes, drafts, bills of exchange and other evidences of indebtedness, and to loan money on real or personal security, and to purchase notes, bills of exchange, acceptances or other choses in action, and to take and receive interest or discounts subject to G.S. 53-43(1).
- (2) To make loans and charge and receive interest at rates not exceeding the rates of interest provided in G.S. 24-1.1 and 24-1.2.
- (3) To establish branch offices or places of business within the county in which its principal office is located, and elsewhere in the State, after having first obtained the written approval of the Commissioner of Banks, which approval may be given or withheld by the Commissioner of Banks in his discretion. The Commissioner of Banks, in exercising such discretion, shall take into account, but not by way of limitation, such factors as the financial history and condition of the applicant bank, the adequacy of its capital structure, its future earnings prospects, and the general character of its management. Such approval shall not be given until he shall find
 - a. That the establishment of such branch or teller's window will meet the needs and promote the convenience of the community to be served by the bank, and
 - b. That the probable volume of business and reasonable public demand in such community are sufficient to assure and maintain the solvency of said branch or teller's window and of the existing bank or banks in said community.

Provided, that the Commissioner of Banks shall not authorize the establishment of any branch the paid-in capital of whose parent bank is not sufficient in amount to provide for capital in an amount equal to that required with respect to the establishment of branches of commercial banks under the provisions of G.S. 53-62. For the purposes of this paragraph, the provisions of G.S. 53-62 as to the meaning of the word "capital" shall be applicable.

A bank may discontinue a branch office upon resolution of its board of directors or board of managers. Upon the adoption of such a resolution, the bank shall file a certification with the Commissioner of Banks specifying the location of the branch office to be discontinued and the date upon which it is proposed that the discontinuance shall be effective. This certificate must state the reasons for the closing of such branch and indicate that the needs and convenience of the community would still be adequately met. Notice stating the intention to discontinue the said branch shall be published in a newspaper serving said community once a week for four consecutive weeks before a certificate requesting a discontinuance is filed with the Commissioner of Banks. No such branch may be discontinued until approved by the Commissioner of Banks, who shall first hold a public hearing thereon, if so requested by any interested party.

- (4) Subject to the approval of the Commissioner of Banks and on the authority of its board of directors, or a majority thereof, to enter into such contract, incur such obligations and generally to do and perform any and all such acts and things whatsoever as may be necessary or appropriate in order to take advantage of any and all memberships, loans, subscriptions, contracts, grants, rights or privileges, which may at any time be available or inure to banking institutions, or to their depositors, creditors, stockholders, conservators, receivers or liquidators, by virtue of those provisions of section eight of the Federal Banking Act of 1933 (section twelve B of the Federal Reserve Act as amended) which establish the Federal Deposit Insurance Corporation and provide for the insurance of deposits, or of any other provisions of that or any other act or resolution of Congress to aid, regulate or safeguard banking institutions and their depositors, including any amendments of the same or any substitutions therefor; also, to subscribe for and acquire any stock, debentures, bonds or other types of securities of the Federal Deposit Insurance Corporation and to comply with the lawful regulations and requirements from time to time issued or made by such corporations.
- (5) To solicit, receive and accept money or its equivalent on deposit both in savings accounts and upon certificates of deposit.
- (6) Subject to the approval of the State Banking Commission, to solicit, receive and accept money or its equivalent on deposit subject to check; provided, however, no such approval shall be given unless and until such industrial bank meets the capital requirements of a commercial bank as set forth in G.S. 53-2. (1923, c. 225, s. 6; C.S., s. 225(f); 1925, c. 199, s. 1; 1931, c. 243, s. 5; 1935, c. 81, s. 2; 1939, c. 244, ss. 1, 2; 1943, c. 233; 1945, c. 283; 1949, c. 952, ss. 1, 2; 1959, c. 365; 1967, c. 789, s. 19; 1969, c. 1303, ss. 10-12.)

Editor's Note. — The reference in the introductory paragraph to "paragraphs 1, 2, 3, 5 and 7 of G.S. 55-17" should be to subdivisions 1, 2, 3, 5 and 7 of subsection (a) of G.S. 55-17. The correct reference has been inserted in brackets.

Legal Periodicals. — For comment on the 1949 amendment to this section, see 27 N.C.L. Rev. 425.

For comment on usury law in North Carolina, see 47 N.C.L. Rev. 761 (1969).

§ 53-142. Restriction on powers.

No industrial bank shall deposit any of its funds in any banking corporation unless such corporation has been designated as such depository by a vote of a majority of the directors, or of the executive committee, exclusive of any director who is an officer, director, or trustee of the depository so designated, present

at any meeting duly called at which a quorum is in attendance, and approved by the Commissioner of Banks. (1923, c. 225, s. 7; C.S., s. 225(g); 1931, c. 243, s. 5; 1937, c. 220.)

§ 53-143. Investments; securities; loans; limitations.

The provisions of G.S. 53-46, 53-48 and 53-49, with reference to the limitations of investments in securities, limitations of loans and suspensions of investment and loan limitations, shall be applicable to industrial banks. (1923, c. 225, s. 8; C.S., s. 225(h); 1945, c. 127, s. 2.)

§ 53-144. Supervision and examination.

Every industrial bank now or hereafter transacting the business of an industrial bank as defined by this Article, whether as a separate business or in connection with any other business under the laws of and within this State, shall be subject to the provisions of this Article, and shall be under the supervision of the Commissioner of Banks. The Commissioner of Banks shall exercise control of and supervision over the industrial banks doing business under this Article, and it shall be his duty to execute and enforce, through the State bank examiners and such other agents as are now or may hereafter be created or appointed, all laws which are now or may hereafter be enacted relating to industrial banks as defined in this Article. For the more complete and thorough enforcement of the provisions of this Article, the State Banking Commission is hereby empowered to promulgate such rules, regulations, and instructions, not inconsistent with the provisions of this Article, as may, in its opinion, be necessary to carry out the provisions of the laws relating to industrial banks as in this Article defined, and as may be further necessary to insure such safe and conservative management of industrial banks under the supervision of the Commissioner of Banks as may provide adequate protection for the interest of creditors, stockholders, and the public, in their relations with such institutions. All industrial banks doing business under the provisions of this Article shall conduct their business in a manner consistent with all laws relating to industrial banks, and all rules, regulations and instructions that may be promulgated or issued by the State Banking Commission. (1923, c. 225, s. 11; C.S., s. 225(k); 1931, c. 243, s. 5; 1939, c. 91, s. 2.)

§ 53-145. Sections of general law applicable.

Sections 53-1, 53-3, 53-4, 53-5, 53-6, 53-7, 53-8, 53-9, 53-10, 53-11, 53-12, 53-13, 53-18, 53-20, 53-22, 53-23, 53-42, 53-42.1, 53-47, 53-50, 53-51, 53-54, 53-63, 53-64, 53-67, 53-68, 53-70, 53-71, 53-72, 53-73, 53-74, 53-78, 53-79, 53-80, 53-81, 53-82, 53-83, 53-85, 53-87, 53-88, 53-90, 53-91, 53-105, 53-106, 53-107, 53-108, 53-109, 53-110, 53-111, 53-112, 53-117, 53-118, 53-119, 53-120, 53-121, 53-122, 53-123, 53-124, 53-125, 53-126, 53-128, 53-129, 53-132, 53-133, 53-134, relating to the supervision and examination of commercial banks, shall be construed to be applicable to industrial banks, insofar as they are not inconsistent with the provisions of this Article. Sections 53-19, 53-24, 53-37, 53-39, 53-40, 53-41, 53-44, 53-45, 53-58, 53-59, 53-61, 53-66, 53-75, 53-76, 53-77, 53-86, 53-113, 53-114, 53-115, 53-116, 53-135, 53-146, and 53-148 through 53-158, relating to commercial banks, shall be construed to be applicable to industrial banks. (1923, c. 225, s. 13; C.S., s. 225(m); 1927, c. 141; 1939, c. 244, s. 3; 1945, c. 743, s. 1; 1981, c. 671, s. 14.)

Editor's Note. — Sections 53-72 and 53-74 referred to in the first sentence of the section were repealed by Session Laws 1971, c. 244, s. 3, and § 53-58, referred to in the second sentence of this section, was repealed by Session Laws 1965, c. 700, s. 2.

Effect of Amendments. — The 1981 amendment, effective July 1, 1981, inserted the reference to § 53-42.1.

ARTICLE 12.

Joint Deposits.

§ 53-146. Deposits in two names.

When a deposit has been or is hereafter made in any bank, trust company, banking and trust company, or any other institution transacting business in this State, in the names of two persons, payable to either, or payable to either or the survivor, all or any part of the deposit, or any interest or dividend thereon, may be paid to either of said persons, whether the other is living or not; and the receipt or acquittance of the person so paid is a valid and sufficient discharge to the bank for payment so made. (1917, c. 243, s. 1; C.S., s. 230.)

Legal Periodicals. — For discussion of section, see 9 N.C.L. Rev. 14.

For note on rights of a survivor to a joint bank account, see 31 N.C.L. Rev. 95 (1952); 35 N.C.L. Rev. 75 (1956).

For note on joint bank accounts without

survivorship provision in joint account agreement, see 35 N.C.L. Rev. 352 (1957).

For note on joint bank accounts with the right of survivorship in North Carolina, see 46 N.C.L. Rev. 669 (1968).

CASE NOTES

Section is for protection of bank only. O'Brien v. Reece, 45 N.C. App. 610, 263 S.E.2d 817 (1980).

Ownership of Funds. — Absent any other evidence, this section is not dispositive as to the ownership of funds. O'Brien v. Reece, 45 N.C. App. 610, 263 S.E.2d 817 (1980).

Instrument in Husband's Name and Payable to Himself "or" Wife. — The certificate of deposit by a bank in the name of the husband,

payable to himself "or" his wife does not fall within the provisions of this section. It applies only where the deposit is made in the names of two persons and payable to either; nor can construing the word "or" as meaning "and" have the effect of creating a tenancy in common. Jones v. Fullbright, 197 N.C. 274, 148 S.E. 229 (1929).

Cited in Redmond v. Farthing, 217 N.C. 678, 9 S.E.2d 405 (1940).

§ 53-147: Repealed by Session Laws 1943, c. 543.

ARTICLE 13.

Conservation of Bank Assets and Issuance of Preferred Stock.

§ 53-148. Provision for bank conservators; duties and powers.

Whenever he shall deem it necessary, in order to conserve the assets of any bank for the benefit of the depositors and other creditors thereof, the Commissioner of Banks may (with the approval of the Governor), appoint a conservator for such bank and require of such conservator such bond with such security as he may deem necessary and proper. The conservator, under the direction of the Commissioner of Banks, shall take possession of the books, records and assets of every description of such bank, and take such action as may be necessary to conserve the assets of such bank pending further disposition of its business as

provided by law. Such conservator shall have all such rights, powers and privileges, subject to the Commissioner of Banks, now possessed by or hereafter given to the Commissioner of Banks under G.S. 53-20, as amended, as are necessary to conserve the assets of said bank. During the time that such conservator remains in possession of such bank, the rights of all parties with respect thereto, shall be the same as those provided in G.S. 53-20, as amended. All expenses of any such conservator shall be paid out of the assets of such bank and shall be a lien thereon which shall be prior to any other lien provided by this Article or otherwise. The conservator shall receive as salary an amount no greater than that paid at the present time to employees of departments of the State government for similar services. (1933, c. 155, s. 1.)

Legal Periodicals. — For similarity to federal act, see 11 N.C.L. Rev. 196.

§ 53-149. Examination of bank.

The Commissioner of Banks shall cause to be made such examination of the affairs of such bank as shall be necessary to inform him as to the financial condition of such bank. (1933, c. 155, s. 2.)

§ 53-150. Termination of conservatorship.

If the Commissioner of Banks shall become satisfied that it may safely be done, he may, in his discretion, terminate the conservatorship and permit such bank to resume the transaction of its business, subject to such terms, conditions, restrictions and limitations as he may prescribe. (1933, c. 155, s. 3.)

§ 53-151. Special funds for paying depositors and creditors ratably; new deposits.

While such bank is in the hands of the conservator appointed by the Commissioner of Banks, the Commissioner of Banks may require the conservator to set aside from unpledged assets and make available for withdrawal by depositors and payment to other creditors on a ratable basis, such amounts as, in the opinion of the Commissioner of Banks, may safely be used for this purpose; and the Commissioner of Banks, may, in his discretion, permit the conservator to receive deposits, but deposits received while the bank is in the hands of the conservator (as well as special or trust deposits received by any bank, under the orders of the Commissioner of Banks, since March 2, 1933), shall not be subject to any limitation as to payment or withdrawal, and such deposits shall be segregated and shall not be used to liquidate any indebtedness of such bank existing at the time that a conservator was appointed for it, or any subsequent indebtedness incurred for the purpose of liquidating any indebtedness of said bank existing at the time such conservator was appointed. Such deposits received while the bank is in the hands of the conservator, as well as the special or trust deposits received since March 2, 1933, shall be kept on hand in cash or on deposit with a federal reserve bank. In being transmitted to the federal reserve bank, said deposits shall be so marked and designated as to indicate to such federal reserve bank that they are special deposits. (1933, c. 155, s. 4.)

§ 53-152. Reorganization on agreement of depositors and stockholders.

By the agreement of (i) depositors and other creditors of any bank representing at least seventy-five percent (75%) in amount of its total deposits and other liabilities as shown by the books of the banks, or (ii) stockholders owning at least two thirds of each class of its outstanding capital stock as shown by the books of the bank, or (iii) both depositors and other creditors representing at least seventy-five percent (75%) in amount of the total deposits and other liabilities, and stockholders owning at least two thirds of its outstanding capital stock as shown by the books of the bank, any bank may effect such reorganization with the consent and approval of the Commissioner of Banks as by such agreement may be determined: Provided, however, that claims of depositors or other creditors which will be satisfied in full under the provisions of the plan of reorganization shall not be included among the total deposits and other liabilities of the bank in determining the percent thereof as above provided.

When such reorganization becomes effective, all books, records and assets of such bank shall be disposed of in accordance with the provisions of the plan, and the affairs of the bank shall be conducted by its board of directors in the manner provided by the plan and under the conditions, restrictions and limitations which may have been prescribed by the Commissioner of Banks. In any reorganization which shall have been approved, and shall have become effective as provided herein, all depositors and other creditors and stockholders of such bank, whether or not they shall have consented to such plan of organization, shall be fully and in all respects subject to and bound by its provisions, and claims of all depositors and other creditors shall be treated as if they had consented to such plan of reorganization: Provided, however, that no reorganization shall affect the lien of secured creditors. (1933, c. 155, s. 5.)

Legal Periodicals. — For similarity to federal act, see 11 N.C.L. Rev. 196.

§ 53-153. Segregation of recent deposits not effective after bank turned back to officers; notice of turning bank back to officers.

After 15 days after the affairs of a bank shall have been turned back to its board of directors by the conservator, either with or without a reorganization as provided in G.S. 53-152 hereof, the provisions of G.S. 53-151 with respect to the segregation of deposits received while it is in the hands of the conservator, and with respect to the use of such deposits to liquidate the indebtedness of such bank, shall no longer be effective: Provided, that before the conservator shall turn back the affairs of the bank to its board of directors, he shall cause to be published in a newspaper published in the city, town or county in which such bank is located, and if no newspaper is published in such city, town or county, in a newspaper to be selected by the Commissioner of Banks, a notice in form approved by the Commissioner of Banks, stating the date on which the affairs of the bank will be returned to its board of directors, and that the said provisions of G.S. 53-151 will not be effective after 15 days after such date; and on the date of publication of such notice, the conservator shall immediately send to every person who is a depositor in such bank under G.S. 53-151, a copy of such notice by registered mail, addressing it to the last known address of such persons shown by the records of the bank; and the conservator shall send similar notice in like manner to every person making deposit in such bank

under G.S. 53-151, after the date of such newspaper publication and before the time when the affairs of the bank are returned to its directors. (1933, c. 155, s. 6.)

§ 53-154. Issuance of preferred stock.

Notwithstanding any other provision of this Article or any other law, and notwithstanding any of the provisions of its articles of incorporation or bylaws, any bank may, with the approval of the Commissioner of Banks, and by vote of stockholders owning a majority of the stock of such bank, upon not less than two days' notice given by registered mail pursuant to action taken at a meeting of its board of directors (which may be held upon not less than one day's notice) issue preferred stock in such amount and with such par value and at such annual dividend rate as shall be approved by said Commissioner of Banks. A copy of the minutes of such directors' and stockholders' meetings, certified by the proper officer and under the corporate seal of the bank, and accompanied by the written approval of the Commissioner of Banks shall be immediately filed in the office of the Secretary of State, and when so filed, shall be deemed and treated as an amendment to the articles of incorporation of such bank.

No issue of preferred stock shall be valid until the par value of all stock so issued shall have been paid for in full in cash or in such manner as may be specifically approved by the Commissioner of Banks. (1933, c. 155, s. 7; 1979, c. 483, s. 16.)

§ 53-155. Rights and liabilities of preferred stockholders.

The holders of such preferred stock shall be entitled to cumulative dividends payable at an annual rate approved by the Commissioner of Banks, but shall not be held individually responsible as such holders for any debts, contracts or engagements of such bank, and shall not be liable for assessments to restore impairments in the capital of such banks as now provided by law with reference to holders of common stock in banks. Notwithstanding any other provisions of law, the holders of such preferred stock shall have such voting rights and such stock shall be subject to retirement in such manner and on such terms and conditions as may be provided in the articles of incorporation or any amendment thereto, with the approval of the Commissioner of Banks.

No dividends shall be declared or paid on common stock until the cumulative dividends on the preferred stock shall have been paid in full; and if the bank is placed in liquidation, no payments shall be made to the holders of the common stock until the holders of the preferred stock shall have been paid in full the par value of such stock and all accumulated dividends. (1933, c. 155, s. 8; 1979, c. 483, s. 17.)

§ 53-156. Term "stock" to include preferred stock.

Whenever in existing banking law, the words "stock," "stockholders," "capital," or "capital stock" are used, the same shall be deemed to include preferred stock: Provided, that no bank issuing preferred stock under the provisions hereof, shall be permitted at any time to make loans secured by such preferred stock; provided further that such words shall not be deemed to include preferred stock where they are used in G.S. 53-2, 53-10, 53-80, 53-87, 53-88 and 53-139. (1933, c. 155, s. 9; 1935, c. 80; 1953, c. 675, s. 5; 1979, c. 483, s. 18.)

§ 53-157. Rights and liabilities of conservator.

The conservator appointed pursuant to the provisions of this Article shall be subject to the provisions of and to the penalties prescribed by G.S. 53-43, 53-129, and 53-131. (1933, c. 155, s. 10.)

§ 53-158. Naming of conservator not liquidation.

No power conferred in this Article upon the Commissioner of Banks, when exercised, shall be deemed an act of possession for the purposes of liquidation; and whenever the Commissioner of Banks shall, with reference to any bank for which a conservator is appointed, deem that liquidation is necessary, he shall exercise the powers for the purposes of liquidation as provided in G.S. 53-20 as amended. (1933, c. 155, s. 11.)

ARTICLE 14.***Banks Acting in a Fiduciary Capacity.*****§ 53-159. Bank may act as fiduciary.**

Any bank licensed by the Commissioner of Banks, where such powers or privileges are granted it in its charter, may be guardian, trustee, assignee, receiver, executor or administrator in this State without giving any bond; and the clerks of the superior courts, or other officers charged with the duty or clothed with the power of making such appointments, are authorized to appoint such bank to any such office. (1945, c. 743, s. 1.)

Legal Periodicals. — For article on North insolvent debtors, see 17 Wake Forest L. Rev. Carolina receivership statutes applicable to 745 (1981).

CASE NOTES

Stated in *Wiggins v. Finch*, 232 N.C. 391, 61 S.E.2d 72 (1950).

§ 53-159.1. Power of fiduciary or custodian to deposit securities in a clearing corporation.

Notwithstanding any other provision of law, any fiduciary holding securities in its fiduciary capacity, any bank or trust company holding securities in a fiduciary capacity or as a custodian or agent is authorized to deposit or arrange for the deposit of such securities in a clearing corporation as defined in G.S. 25-8-102(3). When such securities are so deposited, certificates representing securities of the same class of the same issuer may be merged and held in bulk in the name of the nominee of such clearing corporation with any other such securities deposited in such clearing corporation by any person regardless of the ownership of such securities, and certificates of small denomination may be merged into one or more certificates of larger denomination. The records of such fiduciary and the records of such bank or trust company acting as a fiduciary or as a custodian or managing agent shall at all times show the name of the party for whose account the securities are so deposited. Title to such securities may be transferred by bookkeeping entry on the books of such clearing corporation without physical delivery of certificates representing such securities. A bank or trust company so depositing securities pursuant to this

section shall be subject to such rules and regulations as, in the case of State-chartered institutions, the State Banking Commission and, in the case of national banking associations, the Comptroller of the Currency may from time to time issue. A bank or trust company acting as custodian or agent for a fiduciary shall, on demand by the fiduciary, certify in writing to the fiduciary the securities so deposited by such bank or trust company in such clearing corporation for the account of such fiduciary. A fiduciary shall, on demand by any party to a judicial proceeding for the settlement of such fiduciary's account or on demand by the attorney for such party, certify in writing to such party the securities deposited by such fiduciary in such clearing corporation for its account as such fiduciary. This section shall apply to any fiduciary holding securities in its fiduciary capacity, and to any bank or trust company holding securities as a fiduciary or as a custodian or managing agent acting on May 15, 1973, or who thereafter may act regardless of the date of the agreement, instrument or court order by which it is appointed and regardless of whether or not such fiduciary, custodian or agent owns capital stock of such clearing corporation. The fiduciary shall personally be liable for any loss to the trust resulting from an act of such nominee in connection with such securities so deposited. (1973, c. 497, s. 4.)

§ 53-160. License to do business.

Before any such bank is authorized to act in any fiduciary capacity without bond, it must be licensed by the Commissioner of Banks of the State. For such license the licensee shall pay to the State Banking Commission an annual license fee of two hundred dollars (\$200.00), which shall be remitted to the State Treasurer for the use of the Commissioner of Banks in the supervision of banks acting in a fiduciary capacity, insofar as it may be necessary, and the surplus, if any, shall remain in the State treasury for the use of the general fund of the State: Provided, however, that a national bank which has been granted trust powers by the Comptroller of the Currency or his duly authorized agent shall be annually licensed as required in this section and shall be granted a certificate of solvency which will meet the provisions of G.S. 53-162 without examination by the Commissioner of Banks as required in G.S. 53-161. (1945, c. 743, s. 1; 1967, c. 789, s. 20.)

§ 53-161. Examination as to solvency.

The Commissioner of Banks shall examine into the solvency of such bank, and shall, if he deem it necessary, at the expense of the bank, make or cause to be made an examination at its home office of its assets and liabilities. (1945, c. 743, s. 1.)

§ 53-162. Certificate of solvency.

After any such bank has been licensed by the Commissioner of Banks, a certificate issued by the Commissioner of Banks, showing the bank to be solvent to an amount not less than one hundred thousand dollars (\$100,000), shall authorize such bank to act in a fiduciary capacity without bond. There shall be no charge for the seal of this certificate. (1945, c. 743, s. 1.)

§ 53-163. Clerk of superior court notified of license and revocation.

The Commissioner of Banks, upon granting license to any such bank, shall immediately notify the clerk of the superior court of each county in the State that such bank has been licensed under this Article, and, whenever the Com-

missioner of Banks is satisfied that any bank licensed by him has become insolvent, or is in imminent danger of insolvency, he shall revoke the license granted to such bank and notify the clerk of the superior court of each county in the State of the revocation. After such notification, the right of any such bank to act in a fiduciary capacity shall cease. (1945, c. 743, s. 1.)

ARTICLE 15.

North Carolina Consumer Finance Act.

§ 53-164. Title.

This Article shall be known and may be cited as the North Carolina Consumer Finance Act. (1961, c. 1053, s. 1.)

Cross References. — As to effect of secured transaction provisions of Uniform Commercial Code, see § 25-9-201.

Editor's Note. — Session Laws 1961, c. 1053, s. 3, provides that all laws and clauses of laws in conflict with this Article are hereby repealed; provided, however, § 105-88 is not hereby repealed; provided § 14-391 shall not be applicable to persons licensed under this Article; and, provided, further, all other laws and provisions of laws repealed by this Article shall, notwithstanding, continue in force and

effect with respect to all acts prohibited or required to be performed pursuant thereto prior to August 18, 1961.

Session Laws 1961, c. 1053, s. 4, provides that no person, as defined in § 53-165, who does not have a permit or license to engage in the business regulated by Article 15 of Chapter 53 on June 19, 1961, shall be issued any such permit or license within 60 days after such ratification.

Legal Periodicals. — For comment on usury law in North Carolina, see 47 N.C.L. Rev. 761 (1969).

CASE NOTES

Cited in *Northcutt v. Clayton*, 269 N.C. 428, 152 S.E.2d 471 (1967).

§ 53-165. Definitions.

(a) "Amount of the loan" shall mean the aggregate of the cash advance and the charges authorized by G.S. 53-173.

(b) "Borrower" shall mean any person who borrows money from any licensee or who pays or obligates himself to pay any money or otherwise furnishes any valuable consideration to any licensee for any act of the licensee as a licensee.

(c) "Cash advance" shall mean the amount of cash or its equivalent that the borrower actually receives or is paid out at his discretion or on his behalf.

(d) "Commission" shall mean the State Banking Commission.

(e) "Commissioner" shall mean the Commissioner of Banks.

(f) "Deputy commissioner" shall mean the deputy commissioner of banks.

(g) "License" shall mean the certificate issued by the Commissioner under the authority of this Article to conduct a consumer finance business.

(h) "Licensee" shall mean a person to whom one or more licenses have been issued.

(i) "Loanable assets" shall mean cash or bank deposits or installment loans made as a licensee pursuant to this Article or installment loans made as a licensee pursuant to the Article which this Article supersedes or such other loans payable on an installment basis as the Commissioner of Banks may approve, or any combination of two or more thereof.

(j) "Person" shall include any person, firm, partnership, association or corporation. (1957, c. 1429, s. 1; 1961, c. 1053, s. 1.)

§ 53-166. Scope of Article; evasions; penalties; loans in violation of Article void.

(a) **Scope.** — No person shall engage in the business of lending in amounts of three thousand dollars (\$3,000) or less and contract for, exact, or receive, directly or indirectly, on or in connection with any such loan, any charges whether for interest, compensation, consideration, or expense, or any other purpose whatsoever, which in the aggregate are greater than permitted by Chapter 24, except as provided in and authorized by this Article, and without first having obtained a license from the Commissioner. The word "lending" as used in this section, shall include, but shall not be limited to, endorsing or otherwise securing loans or contracts for the repayment of loans.

(b) **Evasions.** — The provisions of subsection (a) of this section shall apply to any person who seeks to avoid its application by any device, subterfuge or pretense whatsoever.

(c) **Penalties; Commissioner to Provide and Testify as to Facts in His Possession.** — Any person not exempt from this Article, or any officer, agent, employee or representative thereof, who fails to comply with or who otherwise violates any of the provisions of this Article, or any regulation of the Banking Commission adopted pursuant to this Article, shall be guilty of a misdemeanor and upon conviction shall be fined not less than five hundred dollars (\$500.00) nor more than twenty-five hundred dollars (\$2,500) or imprisoned not less than four months nor more than two years, or both, in the discretion of the court. Each such violation shall be considered a separate offense. It shall be the duty of the Commissioner of Banks to provide the district attorney of the court having jurisdiction of any such offense with all facts and evidence in his actual or constructive possession, and to testify as to such facts upon the trial of any person for any such offense.

(d) **Additional Penalties.** — Any contract of loan, the making or collecting of which violates any provision of this Article, or regulation thereunder, except as a result of accidental or bona fide error of computation shall be void and the licensee shall have no right to collect, receive or retain any principal or charges whatsoever with respect to such loan. (1955, c. 1279; 1957, c. 1429, s. 8; 1961, c. 1053, s. 1; 1969, c. 1303, ss. 13, 14; 1973, c. 47, s. 2; c. 1042, s. 1; 1979, c. 33, s.1.)

Legal Periodicals. — For comment on usury law in North Carolina, see 47 N.C.L. Rev. 761 (1969).

CASE NOTES

Article Inapplicable to Loan Agencies Subject to § 105-88. — All loan agencies subject to the provisions of § 105-88 are not subject to the provisions of this Article. Section 105-88 applies to all the loan agencies specified therein, irrespective of the amounts which they loan or the interest they charge. *Northcutt v. Clayton*, 269 N.C. 428, 152 S.E.2d 471 (1967).

And to Insurance Premium Finance Companies. — Had the legislature intended to subject to the provisions of this Article those who make loans solely to finance insurance pre-

miums, surely it would not have enacted Article 4 of Chapter 58 in the first instance since it exempts from its provisions those subject to this Article. The legislature did not deem it necessary for both the Commissioner of Banks and the Commissioner of Insurance to supervise an insurance premium financing company. *Northcutt v. Clayton*, 269 N.C. 428, 152 S.E.2d 471 (1967).

Applied in In re Dickson, 432 F. Supp. 752 (W.D.N.C. 1977).

§ 53-167. Expenses of supervision.

Each licensee, for the purpose of defraying necessary expenses of the Commissioner of Banks and his agents in supervising them, shall pay to the Commissioner of Banks the fees prescribed in G.S. 53-122 at the times therein specified. (1955, c. 1279; 1957, c. 1429, s. 1; 1961, c. 1053, s. 1.)

CASE NOTES

Fee Is in Addition to Privilege Tax. — In addition to the fee required by this section, each licensee under this Article also pays the \$750.00 privilege tax exacted by § 105-88. *Northcutt v. Clayton*, 269 N.C. 428, 152 S.E.2d 471 (1967).

And Is Intended to Pay Expenses of

Supervision. — The fees exacted of insurance premium financiers by § 58-56 and of persons engaged in business under this Article by this section are intended to pay the necessary expenses of licensing, regulating, and supervising the business. *Northcutt v. Clayton*, 269 N.C. 428, 152 S.E.2d 471 (1967).

§ 53-168. License required; showing of convenience, advantage and financial responsibility; investigation of applicants; hearings; existing businesses; contents of license; transfer; posting.

(a) **Necessity for License; Prerequisites to Issuance.** — No person shall engage in or offer to engage in the business regulated by this Article unless and until a license has been issued by the Commissioner of Banks, and the Commissioner shall not issue any such license unless and until he finds:

- (1) That authorizing the applicant to engage in such business will promote the convenience and advantage of the community in which the applicant proposes to engage in business; and
- (2) That the financial responsibility, experience, character and general fitness of the applicant are such as to command the confidence of the public and to warrant the belief that the business will be operated lawfully and fairly, within the purposes of this Article; and
- (3) That the applicant has available for the operation of such business at the specified location loanable assets of at least twenty-five thousand dollars (\$25,000).

(b) **Investigation of Applicants.** — Upon the receipt of an application, the Commissioner shall investigate the facts. If the Commissioner determines from such preliminary investigation that the applicant does not satisfy the conditions set forth in subsection (a), he shall so notify the applicant who shall then be entitled to a hearing thereon provided he so requests in writing within 30 days after the Commissioner has caused the above-referred to notification to be mailed to the applicant. In the event of a hearing, to be held in the offices of the Commissioner of Banks in Raleigh, the Commissioner shall reconsider the application and, after the hearing, issue a written order granting or denying such application. At the time of making such application, the applicant shall pay the Banking Department the sum of two hundred fifty dollars (\$250.00) as a fee for investigating the application, which shall be retained irrespective of whether or not a license is granted the applicant.

(c) **Existing Business.** — Notwithstanding the provisions of this section, any person, firm or corporation which, on December 31, 1973, was a licensee under this Article either as a licensee to make loans under the provisions of G.S. 53-173 or as a motor vehicle lender under G.S. 53-176.1, may surrender such license to the Commissioner within 90 days after May 25, 1974, and elect to become a licensee to make loans under either G.S. 53-173 or 53-176.1 but not

both. Such license shall be issued by the Commissioner without further application or investigation and the licensee shall be deemed a licensee under the category that it elects upon the surrender of its current license and the election.

(d) Required Assets Available. — Each licensee shall continue at all times to have available for the operation of the business at the specified location loanable assets of at least twenty-five thousand dollars (\$25,000). The requirements and standards of this subsection and subsection (a)(2) of this section shall be maintained throughout the period of the license and failure to maintain such requirements or standards shall be grounds for the revocation of a license under the provisions of G.S. 53-171 of this Article.

(e) License, Posting, Continuing. — Each license shall state the address at which the business is to be conducted and shall state fully the name of the licensee, and if the licensee is a copartnership, or association, the names of the members thereof, and if a corporation, the date and place of its incorporation. Transfer or assignment of a license by one person to another by sale or otherwise is prohibited without the prior approval of the Commissioner. Each license shall be kept posted in the licensed place of business. Each license shall remain in full force and effect until surrendered, revoked, or suspended as hereinafter provided. (1961, c. 1053, s. 1; 1969, c. 1303, s. 15; 1973, c. 1042, s. 2; 1981, c. 671, s. 15.)

Effect of Amendments. — The 1982 amendment, effective July 1, 1981, substituted "two hundred fifty dollars (\$250.00)" for "one hun-

dred dollars (\$100.00)" in the last sentence of subsection (b).

§ 53-169. Application for license.

The application for license shall be made on a form prepared and furnished by the Commissioner of Banks and shall state:

- (1) The fact that the applicant desires to engage in business under this Article; and
- (2) Whether the applicant is an individual, partnership, association or corporation; and
- (3) The name and address of the person who will manage and be in immediate control of the business; and
- (4) The name and address of the owners and their percentage of equity in the company, except when the Commissioner does not deem it feasible to furnish such information because of the number of stockholders involved; and
- (5) When the applicant proposes to commence doing business; and
- (6) Such other information as the Commissioner of Banks deems necessary.

The statements made in such application shall be sworn to by the applicant or persons making application on the applicant's behalf. (1961, c. 1053, s. 1.)

§ 53-170. Locations; change of ownership or management.

(a) Business Location. — A licensee may conduct and carry on his business only at such location or locations as may be approved by the Commissioner of Banks, and no changes shall be made from one location to another without the approval of the Commissioner.

(b) Additional Places of Business. — Not more than one place of business shall be maintained under the same license, but the Commissioner may issue more than one license to the same licensee upon compliance with all the provisions of this Article governing issuance of a single license.

(c) Change of Location, Ownership or Management. — If any change occurs in the name and address of the licensee or of the president, secretary or agent of a corporation, or in the membership of any partnership under said sections, a true and full statement of such change, sworn to in the manner required by this Article in the case of the original application, shall forthwith be filed with the Commissioner. (1961, c. 1053, s. 1.)

§ 53-171. Revocation, suspension or surrender of license.

(a) If the Commissioner shall find, after due notice and hearing, or opportunity for hearing, that any such licensee, or an officer, agent, employee, or representative thereof has violated any of the provisions of this Article, or has failed to comply with the rules, regulations, instructions or orders promulgated by the Commission pursuant to the powers and duties prescribed therein, or has failed or refused to make its reports to the Commissioner, or has failed to pay the fees for its examination and supervision, or has furnished false information to the Commissioner or the Commission, the Commissioner may issue an order revoking or suspending the right of such licensee and such officer, agent, employee or representative to do business in North Carolina as a licensee, and upon receipt of such an order from the Commissioner, the licensee shall immediately surrender his license to the Commissioner. Within five days after the entry of such an order the Commissioner shall place on file his findings of fact and mail or otherwise deliver a copy to the licensee. Any licensee who fails to make any loans during any period of 90 consecutive days after being licensed shall surrender his license to the Commissioner.

(b) Any licensee may surrender any license by delivering it to the Commissioner with written notice of its surrender, but such surrender shall not affect his civil or criminal liability for acts committed prior thereto.

(c) No revocation, suspension or surrender of any license shall impair or affect the obligation of any preexisting lawful contract between the licensee and any obligor.

(d) The Commissioner, in his discretion, may reinstate suspended licenses or issue new licenses to a person whose license or licenses have been revoked, or surrendered if and when he determines no fact or condition exists which clearly would have justified the Commissioner in refusing originally to issue such license under this Article. (1955, c. 1279; 1961, c. 1053, s. 1.)

§ 53-172. Conduct of other business in same office.

No licensee shall conduct the business of making loans under this Article within any office, suite, room, or place of business in which any other business is solicited or engaged in unless, in the opinion of the Commissioner, such other business would not be contrary to the best interests of the borrowing public and is authorized by the Commissioner in writing. The making of home loans as defined in G.S. 24-1.1A(e) or the making of noncommercial loans in a principal amount in excess of twenty-five thousand dollars (\$25,000) is contrary to the best interest of the borrowing public and shall not be authorized by the Commissioner.

If the conduct of any other business authorized by the Commissioner should, in the opinion of the Commissioner, prove contrary to the best interests of the borrowing public, the authority granted to conduct such business shall be withdrawn in writing by the Commissioner.

Installment paper dealers as defined in G.S. 105-83, and the collection by a licensee of loans legally made in North Carolina, or another state by another government regulated lender or lending agency, shall not be considered as being any other business within the meaning of this section. This section shall not be construed as authorizing the collection of any loans or charges in viola-

tion of the prohibitions contained in G.S. 53-190. The books, records, and accounts relating to loans shall be kept in such manner as the Commissioner of Banks prescribes as to delineate clearly the loan business from any other business authorized by the Commissioner. (1961, c. 1053, s. 1; 1967, c. 769, s. 1; 1971, c. 1212; 1981, c. 464, s. 2.)

Effect of Amendments. — The 1981 amendment added the second sentence of the first paragraph. Session Laws 1981, c. 464, s. 5, provides: "This act shall become effective 10 days after ratification except that the Commissioner

of Banks shall have the authority to set a maximum rate effective on such tenth day as if this act had been in effect 30 days prior to ratification." The act was ratified July 10, 1981.

§ 53-173. Maximum rate of charge; computation of charges; limitation on interest after judgment; limitation on interest after maturity of the loan; inapplicability of other sections.

(a) **Maximum Rate of Charge.** — Every licensee hereunder may contract for, compute, and receive on any loan of money, not exceeding three thousand dollars (\$3,000) in amount, charges at rates not exceeding thirty-six percent (36%) per annum on that part of the unpaid principal balance of any loan not in excess of six hundred dollars (\$600.00) and fifteen percent (15%) per annum on any remainder of such unpaid principal balance.

(b) **Computation of Charges.** — Charges on loans made pursuant to this section shall not be paid, deducted, or received in advance. Such charges shall not be compounded but charges on loans shall (i) be computed and paid only as a percentage of the unpaid principal balance or portion thereof and (ii) computed on the basis of the number of days actually elapsed; provided, however, if part or all of the consideration for a loan contract is the unpaid principal balance of a prior loan, then the principal amount payable under the loan contract may include any unpaid charges on the prior loan which have accrued within 90 days before the making of the new loan contract. For the purpose of computing charges, a month shall be that period of time from one date in a month to the corresponding date in the following month but if there is no corresponding date, then to the last day of such following month, and a day shall be one thirtieth of a month where computation is made for a fraction of a month. Any payment made on a loan shall be applied first to any accrued interest and then to principal, and any portion or all of the principal balance may be prepaid at any time without penalty.

(c) **Limitation on Interest after Judgment.** — If judgment be obtained against any party on any loan made under the provisions of this section neither the judgment nor the loan shall carry, from the date of the judgment, any interest in excess of eight percent (8%) per annum.

(d) **Limitation of Interest after Maturity of Loan.** — After the maturity date of any loan contract made under the provisions of this section and until the loan contract is paid in full by cash, new loan, refinancing or otherwise, no charges other than interest at eight percent (8%) per annum shall be computed or collected from any party to the loan upon the unpaid principal balance of the loan.

(e) **Inapplicability of Other Sections.** — The provisions of G.S. 53-173.1, 53-174 and 53-175 shall not apply to any loan made pursuant to the provisions of this section.

(f) Subject to the limitations contained in this Article as to maximum rates, the Commission may from time to time, upon the basis of changed conditions or facts, redetermine and refix any such maximum rates of charge, but, before

determining or redetermining any such maximum rates, the Commission shall give reasonable notice of its intention to consider doing so to all licensees and a reasonable opportunity to be heard and introduce evidence with respect thereto. The notice herein required may be given by mailing such notice to the offices of the licensees as shown in the records of the Commissioner of Banks. Any such changed maximum rates of charge shall not affect preexisting loan contracts lawfully entered into between any licensee and any borrower. (1961, c. 1053, s. 1; 1969, c. 1303, ss. 13, 17-22; 1973, c. 1042, s. 3; 1975, c. 110, s. 1; 1979, c. 33, s. 2; 1981, c. 561, ss. 1-3.)

Effect of Amendments. — The 1981 amendment, in subsection (a), substituted "thirty-six percent (36%) per annum" for "three percent (3%) per month", "six hundred dollars (\$600.00)" for "three hundred dollars (\$300.00)" and "fifteen percent (15%) per annum" for "one and one-half percent (1½%) per month." The amendment also substituted "eight percent (8%)" for "six percent (6%)" in subsections (c) and (d). Session Laws 1981, c. 561, s. 9, provides: "This act shall become effective 30 days after ratification and shall apply only to loans made after the effective date of this act and before July 1, 1983. Unless the General Assembly shall provide otherwise before July 1, 1983,

all rates of charge established by this act are repealed and all loans made on or after that date shall be made under the applicable rates of charge on the day before the effective date of this act." The act was ratified June 12, 1981.

Legal Periodicals. — For comment on usury law in North Carolina, see 47 N.C.L. Rev. 76 (1969).

For note on choice of law rules in North Carolina, see 48 N.C.L. Rev. 343 (1970).

For note discussing the appropriate disclosure of inconsistent federal and state requirements with regard to credit terms, see 15 Wake Forest L. Rev. 793 (1979).

CASE NOTES

Small loan operations are subject to state regulation, and enjoy the higher interest rates allowed by this section. Generally speaking, their loans under \$900.00 (now \$3,000) are

allowed to be made at interest rates substantially higher than rates allowed to other lenders. *United States v. Wachovia Corp.*, 313 F. Supp. 632 (W.D.N.C. 1970).

§ 53-173.1. Computations; other procedures.

Every loan made pursuant to the provisions of this Article other than G.S. 53-173 shall be repayable in substantially equal consecutive monthly installments, and subject to the following:

- (1) The charge for payment according to schedule shall be computed at the time the loan is made and when computed shall be added to the cash advance. A licensee shall compute monthly charges for a period of time less than one year at one twelfth of the annual rate for each loan month and shall compute charges for a period of less than one loan month at one thirtieth of one twelfth of the annual rate for each day. A loan month is that period of time from one date in the month through the corresponding date in the next month. If there is no corresponding date, then the last day of the next month will be used. All payments made on account, except those applied to default or deferment charges, shall be applied to the unpaid installments in the order in which they are due.
- (2) The licensee shall not fix a due date of the first installment of any loan contract providing for monthly installments for a term exceeding 45 actual days from the date of the loan. When the first payment of any such contract may be due on a date beyond a loan month defined above, a licensee will be permitted to make an additional charge for the number of days in excess of 30 or the number of days in excess of one loan month from the date of the loan, whichever is less. The charge

for the extra days may be added to the amount of the first installment and shall be excluded in computing any rebate.

- (3) If, as of an installment due date the payment dates of all unpaid installments are deferred for one or more full months and the maturity of the contract is extended for a corresponding period, the licensee may charge and collect a deferment charge, which shall not exceed that portion of the charge for payment according to schedule originally added to the cash advance attributable under the rule of 78's or the sum of the digits principle to the first of the deferred monthly installment periods multiplied by the number of months in which no schedule payment has been made or in which no payment is required by reason of the deferment. The Banking Commission may promulgate any further rules and regulations which may be necessary with regard to the provisions of this subdivision. (1973, c. 1042, s. 4.)

§ 53-173.2: Repealed by Session Laws 1975, c. 110, s. 2.

§ 53-174. Refund.

When any loan contract is paid in full by cash, a new loan, renewal or otherwise, after three loan months have expired, the licensee shall refund or credit the borrower with that portion of the total charges which shall be due the borrower as determined by schedules prepared under the rule of 78's or sum of the digits principle as follows:

"The amount of the refund or credit shall be at least as great a proportion of the total charges originally contracted for, excluding any adjustment made for a first period of more than one month, as the sum of the consecutive monthly balances of the contract schedules to follow the date of prepayment bears to the sum of all the consecutive monthly balances of the contract, those sums to be determined according to the payment schedule originally contracted for." If a loan is prepaid in full by cash, a new loan, renewal or otherwise, two loan months or less from the date of the contract, the licensee shall make a pro rata refund of the charges to the borrower or shall credit such amount to the borrower. In computing any required refund, any prepayment made on or before the 15th day following an installment date shall be deemed to have been made on the installment date preceding such prepayment and any prepayment made after the 15th day following an installment date shall be deemed to have been made on the installment date following such installment; provided, such computation shall not result in refunds by the rule of 78's method on loans prepaid three loan months or less from the date of the contract. When loans are prepaid 15 days or less from the date the loan is made, licensees are authorized in computing refunds to divide the original add-on charge by that figure which represents the number of loan months in the contract. The original add-on charges less the resultant quotient shall constitute the amount of the refund; provided, whenever the resultant quotient is less than two dollars (\$2.00), the minimum charge shall be fixed at two dollars (\$2.00) or the total original add-on charges, whichever is the lesser. The tender by the borrower, or at his request, of an amount equal to the unpaid balance less the required refund must be accepted by the licensee in full payment of the contract. (1961, c. 1053, s. 1; 1969, c. 1303, s. 14.1.)

CASE NOTES

Stated in *In re Dickson*, 432 F. Supp. 752 (W.D.N.C. 1977).

§ 53-175. Default charge.

(a) If the contract so provides, an additional charge for any installment past due 10 days or more according to the original terms of the contract by reason of default may be made in an amount not to exceed five percent (5%) of the amount of the installment past due and said amount may be charged once and no more on the same default; provided, that if such charge is deducted from a payment made on the loan and such deduction results in a default of a subsequent installment, no charge shall be made for such subsequent default; provided, further, that once a borrower has incurred a default charge pursuant to this section, no default charge shall be incurred with respect to any future payments which would not have been in default except for the previous default.

(b) If there is an unpaid balance on a loan at the maturity date as originally scheduled or as deferred, an additional charge at a rate not to exceed eight percent (8%) per annum may be charged on the outstanding balance until the loan is paid in full by cash, a new loan, renewal or otherwise. (1961, c. 1053, s. 1; 1969, c. 1303, s. 23; 1981, c. 561, s. 4.)

Effect of Amendments. — The 1981 amendment substituted "eight percent (8%)" for "six percent (6%)" in subsection (b). Session Laws 1981, c. 561, s. 9, provides: "This act shall become effective 30 days after ratification and shall apply only to loans made after the effective date of this act and before July 1, 1983.

Unless the General Assembly shall provide otherwise before July 1, 1983, all rates of charge established by this act are repealed and all loans made on or after that date shall be made under the applicable rates of charge on the day before the effective date of this act." The act was ratified June 12, 1981.

§ 53-176. Optional rates, maturities and amounts.

In lieu of making loans in the amount, for the term and at the charges stated respectively in G.S. 53-166, 53-173 and 53-180, a licensee may at any time elect to make loans in installments not exceeding five thousand dollars (\$5,000) and which shall not be repayable in less than six months or more than 60 months and which shall not be secured by first deeds of trust or first mortgages on real estate and which are repayable in substantially equal consecutive monthly payments and to charge and collect interest in connection therewith which shall not exceed the rate in effect as announced and published by the Commissioner of Banks pursuant to G.S. 24-1.1(3) and 24-1.2(2a).

Such rate shall be the latest published noncompetitive rate for U. S. Treasury bills with a six-month maturity as of the fifteenth day of the month plus six percent (6%), rounded upward or downward, as the case may be, to the nearest one-half of one percent ($\frac{1}{2}$ of 1%) or sixteen percent (16%), whichever is greater. If there is no nearest one-half of one percent ($\frac{1}{2}$ of 1%), the Commissioner shall round downward to the lower one-half of one percent ($\frac{1}{2}$ of 1%). The rate so announced shall be the maximum rate permitted for the following calendar month on all loans made under this section. Provided, however, a minimum charge of ten dollars (\$10.00) or one dollar (\$1.00) per payment may be agreed to and charged in lieu of interest.

The due date of the first monthly payment shall not be more than 45 days following the disbursement of funds under any such installment loan. A borrower under this section may prepay all or any part of a loan made under this section without penalty. Such election shall be made by the filing of a

written statement to that effect by the licensee with the Commissioner and can be terminated by cancellation notice filed by the licensee in writing with the Commissioner.

No individual, partnership, or corporate licensee and no corporation which is the parent, subsidiary or affiliate of a corporate licensee which is making loans under this Article otherwise than as authorized specially in this section, shall be permitted to make loans under the provisions of this section. Any corporate licensee or individual or partnership licensee making an election to make loans in accordance with the provisions of this section shall respectively be bound by such election with respect to all of its offices and locations in this State and all offices and locations in this State of its parent, subsidiary or affiliated corporate licensee, or with respect to all of his or their offices and locations in this State. (1961, c. 1053, s. 1; 1969, c. 1303, s. 12.1; 1981, c. 561, s. 7.)

Effect of Amendments. — The 1981 amendment substituted "the rate in effect as announced and published by the Commissioner of Banks pursuant to G.S. 24-1.1(3) and 24-1.2(2a)" for "an effective rate of fifteen percent (15%) per annum upon the outstanding balance:" at the end of the present first paragraph and added the second paragraph. The present third paragraph of the section was formerly a part of the first paragraph. Session Laws 1981, c. 561, s. 9, provides: "This act shall

become effective 30 days after ratification and shall apply only to loans made after the effective date of this act and before July 1, 1983. Unless the General Assembly shall provide otherwise before July 1, 1983, all rates of charge established by this act are repealed and all loans made on or after that date shall be made under the applicable rates of charge on the day before the effective date of this act." The act was ratified June 12, 1981.

§ 53-176.1. Motor vehicle lenders.

(a) Any person applying for a license as a motor vehicle lender shall meet all the requirements of G.S. 53-168. A "motor vehicle lender" shall mean any person, firm or corporation licensed under this Article to make loans to borrowers, as authorized in this section, secured by a security interest in a motor vehicle, and whose license shall indicate on the face thereof that such licensee is a motor vehicle lender. A motor vehicle lender is permitted to make loans only under the provisions of this section. No office holding a license under the provisions of this section and making loans secured by motor vehicles may make loans under the provisions of G.S. 53-166, G.S. 53-173, G.S. 53-180, or G.S. 53-141, nor shall such office allow or permit loans under the other provisions of this Article to be made on its premises or any connecting premises. All other provisions of this Article not inconsistent with this section shall apply to a "motor vehicle lender."

(b) A motor vehicle lender may make loans in any amount at rates not exceeding fifteen dollars (\$15.00) per hundred dollars per annum on that part of the cash advance not exceeding five hundred dollars (\$500.00); eleven dollars (\$11.00) per one hundred dollars per annum on that part of the cash advance exceeding five hundred dollars (\$500.00) but not exceeding one thousand dollars (\$1,000); and nine dollars (\$9.00) per one hundred dollars per annum on that part of the cash advance exceeding one thousand dollars (\$1,000) but not exceeding fifteen hundred dollars (\$1,500). Rates on any cash advance in excess of fifteen hundred dollars (\$1,500) shall not exceed the equivalent of sixteen percent (16%) simple interest per annum on the entire amount of the cash advance, provided, that loans made pursuant to this section shall not exceed the sum of five thousand dollars (\$5,000) and shall not exceed a term of 48 months, and shall be secured solely by motor vehicles. (1969, c. 1303, s. 16; 1973, c. 1042, s. 5.)

§ 53-177. Recording fees.

The licensee may collect from the borrower the actual fees paid a public official or agency of a county or the State, for filing, recording, or releasing any instrument securing the loan. A licensee shall not collect or permit to be collected any notary fee in connection with any loan made under this Article. In lieu of recording any instrument and in lieu of collecting any recording fee herein authorized, a lender may take out nonrecording or nonfiling insurance on the instrument securing the loan and charge to the borrower the amount of the premium as fixed by the Commissioner of Insurance, but the amount so charged to the borrower shall not in any event exceed sixty cents (60¢) with respect to any one loan. (1961, c. 1053, s. 1.)

CASE NOTES

Purpose of charge for nonfiling. — The purpose of the sixty cent (60¢) charge for nonfiling insurance is to protect the lender, not the borrower. *Mosley v. National Fin. Co.*, 36 N.C. App. 109, 243 S.E.2d 145, cert. denied, 295 N.C. 467, 246 S.E.2d 9 (1978).

§ 53-178. No further charges; no splitting contracts; certain contracts void.

No further or other charges or insurance commissions shall be directly or indirectly contracted for or received by any licensee except those specifically authorized by this Article. No licensee shall divide into separate parts any contract made for the purpose of or with the effect of obtaining charges in excess of those authorized by this Article. All balances due to a licensee from any person as a borrower or as an endorser, guarantor or surety for any borrower or otherwise, or due from any husband or wife, jointly or severally, shall be considered a part of any loan being made by a licensee to such person for the purpose of computing interest or charges. (1961, c. 1053, s. 1.)

Legal Periodicals. — For comment on usury law in North Carolina, see 47 N.C.L. Rev. 761 (1969).

§ 53-179. Multiple-office loan limitations.

A licensee shall not grant a loan in one office to any borrower who already has a loan in another office operated by the same entity or by an affiliate, parent, subsidiary or under the same ownership, management or control, whether partial or complete. This section shall apply to intrastate and interstate operations. A licensee shall take every reasonable precaution to prevent granting loans in violation of this section. Such loans granted inadvertently resulting in a total liability of three thousand dollars (\$3,000) or less, shall be adjusted to the rates applicable under the Article to a single loan of equivalent amount, and when the total liability on such loans is in excess of three thousand dollars (\$3,000), interest shall be adjusted to simple interest at eight percent (8%) per annum on the entire obligation. (1961, c. 1053, s. 1; 1969, c. 1303, s. 13; 1973, c. 1042, s. 6; 1981, c. 561, ss. 5, 6.)

Effect of Amendments. — The 1981 amendment substituted "three thousand dollars (\$3,000)" for "fifteen hundred dollars (\$1,500)" in two places and "eight percent (8%)" for "six

percent (6%)" in one place in the last sentence. Session Laws 1981, c. 561, s. 9, provides: "This act shall become effective 30 days after ratification and shall apply only to loans made after

the effective date of this act and before July 1, 1983. Unless the General Assembly shall provide otherwise before July 1, 1983, all rates of charge established by this act are repealed and

all loans made on or after that date shall be made under the applicable rates of charge on the day before the effective date of this act." The act was ratified June 12, 1981.

§ 53-180. Limitations and prohibitions on practices and agreements.

(a) Time and Payment Limitation. — Except as otherwise provided in this Article, no licensee making a loan pursuant to G.S. 53-173 shall enter into any contract of loan under this Article providing for any scheduled repayment of principal more than 25 months from the date of making the contract if the cash advance is six hundred dollars (\$600.00) or less; more than 37 months from the date of making the contract if the cash advance is in excess of six hundred dollars (\$600.00) but not in excess of fifteen hundred dollars (\$1,500); more than 49 months from the date of making the contract if the cash advance is in excess of fifteen hundred dollars (\$1,500) but not in excess of two thousand five hundred dollars (\$2,500); or more than 61 months if the cash advance is in excess of two thousand five hundred dollars (\$2,500). Every loan contract shall provide for repayment of the amount loaned in substantially equal installments, either of principal or of principal and charges in the aggregate, at approximately equal periodic intervals of time. Nothing contained herein shall prevent a loan being considered a new loan because the proceeds of the loan are used to pay an existing contract.

(b) No Assignment of Earnings. — A licensee may not take an assignment of earnings of the borrower for payment or as security for payment of a loan. An assignment of earnings in violation of this section is unenforceable by the assignee of the earnings and is revocable by the borrower. A sale of unpaid earnings made in consideration of the payment of money to or for the account of the seller of the earnings is deemed to be a loan to the seller by an assignment of earnings.

(c) Limitation on Default Provisions. — An agreement between a licensee and a borrower pursuant to a loan under this Article with respect to default by the borrower is enforceable only to the extent that (i) the borrower fails to make a payment as required by the agreement, or (ii) the prospect of payment, performance, or realization of collateral is significantly endangered or impaired, the burden of establishing the prospect of a significant endangerment or impairment being on the licensee.

(d) Prohibitions on Discrimination. — No licensee shall deny any extension of credit or discriminate in the fixing of the amount, duration, application procedures or other terms or conditions of such extension of credit because of the race, color, religion, national origin, sex or marital status of the applicant or any other person connected with the transaction.

(e) Limitation on Attorney's Fees. — With respect to a loan made pursuant to the provisions of G.S. 53-173, the agreement may not provide for payment by the borrower of attorney fees.

(f) No Real Property as Security. — No loan made pursuant to the provisions of G.S. 53-173 shall be secured in any way by an interest in real property.

(g) Deceptive Acts or Practices. — No licensee shall engage in any unfair method of competition or unfair or deceptive trade practices in the conduct of making loans to borrowers pursuant to this Article or in collecting or attempting to collect any money alleged to be due and owing by a borrower.

(h) Limitation on Other Loans. — No licensee shall make any home loan as defined in G.S. 24-1.1A(e) whether made pursuant to this Article or some other provision of law; nor shall any licensee make any noncommercial loan in a principal amount in excess of twenty-five thousand dollars (\$25,000). (1961, c.

1053, s. 1; 1969, c. 1303, s. 24; 1973, c. 1042, s. 7; 1979, c. 33, s. 3; 1981, c. 464, s. 3.)

Effect of Amendments. — The 1981 amendment added subsection (h). Session Laws 1981, c. 464, s. 5, provides: "This act shall become effective 10 days after ratification except that the Commissioner of Banks shall have the

authority to set a maximum rate effective on such tenth day as if this act had been in effect 30 days prior to ratification." The act was ratified July 10, 1981.

CASE NOTES

Deceptive Acts or Practices. — Selling credit insurance at inflated premiums, receiving a 25% commission, and failing to disclose these facts, while in a fiduciary

relationship with the borrower, constitutes an unfair and deceptive trade practice within the meaning of this section. In re Dickson, 432 F. Supp. 752 (W.D.N.C. 1977).

§ 53-181. Statements and information to be furnished to borrowers; power of attorney or confession of judgment prohibited.

(a) Contents of Statement Furnished to Borrower. — At the time a loan is made, the licensee shall deliver to the borrower, or if there be two or more borrowers, to one of them a copy of the loan contract, or a written statement, showing in clear and distinct terms:

- (1) The name and address of the licensee and one of the primary obligors on the loan;
- (2) The date of the loan contract;
- (3) Schedule of installments or descriptions thereof;
- (4) The cash advance;
- (5) The face amount of the note evidencing the loan;
- (6) The amount collected or paid for insurance, if any;
- (7) The amount collected or paid for filing or other fees allowed by this Article;
- (8) The collateral or security for the loan.

(b) Schedule of Charges, etc., to Be Made Available; Copy Filed with Commissioner. — Each licensee doing business in North Carolina shall make readily available to the borrower at each place of business such full and accurate schedule of charges and insurance premiums, including refunds and rebates, on all classes of loans currently being made by such licensee, as the Commissioner shall prescribe, and a copy thereof shall be filed in the office of the Commissioner of Banks.

(c) Power of Attorney or Confession of Judgment Prohibited. — No licensee shall take any confession of judgment or permit any borrower to execute a power of attorney in favor of any licensee or in favor of any third person to confess judgment or to appear for the borrower in any judicial proceeding and any such confession of judgment or power of attorney to confess judgment shall be absolutely void. (1955, c. 1279; 1961, c. 1053, s. 1.)

§ 53-182. Payment of loans; receipts.

(a) After each payment made on account of any loan, the licensee shall give to the person making such payment a signed, dated receipt showing the amount paid and the balance due on the loan. No receipt shall be required in the case of payments made by the borrower's check or money order, where the entire proceeds of the check or money order are applied to the loan. The use of a coupon book system shall be deemed in compliance with this section.

(b) Upon payment of any loan in full, a licensee shall cancel and return to the borrower, within a reasonable length of time, any note, assignment, mortgage, deed of trust, or other instrument securing such loan, which no longer secures any indebtedness of the borrower to the licensee. (1955, c. 1279; 1961, c. 1053, s. 1.)

§ 53-183. Advertising, broadcasting, etc., false or misleading statements.

No licensee subject to this Article shall advertise, display, distribute, telecast, or broadcast or cause or permit to be advertised, displayed, distributed, telecasted, or broadcasted, in any manner whatsoever, any false, misleading, or deceptive statement or representation with regard to the rates, terms, or conditions of loans. The Commissioner may require that charges or rates of charge, if stated by a licensee, be stated fully and clearly in such manner as he may deem necessary to prevent misunderstanding thereof by prospective borrowers. The Commissioner may permit or require licensees to refer in their advertising to the fact that their business is under State supervision, subject to conditions imposed by him to prevent an erroneous impression as to the scope or degree of protection provided by this Article. (1957, c. 1429, s. 3; 1961, c. 1053, s. 1.)

§ 53-184. Securing of information; records and reports; allocations of expense.

(a) Each licensee shall maintain all books and records relating to loans made under this Article required by the Commissioner of Banks to be kept, and the Commissioner, his deputy, or duly authorized examiner or agent or employee is authorized and empowered to examine such records at any reasonable time. Such books and records may be maintained in the form of magnetic tape, magnetic disk or other form of computer, electronic or microfilm media available for examination on the basis of computer printed reproduction, video display or other medium acceptable to the Commissioner of Banks; provided, however, that such books and records so kept must be convertible into clearly legible tangible documents within a reasonable time. Any licensee having more than one licensed office may maintain such books and records at a location other than the licensed office location if such location is within the State of North Carolina; provided that, subject to such requirements as may be imposed by the Commissioner of Banks, there shall be available to the borrower at each licensed location or such other location convenient to the borrower, as designated by the licensee, complete loan information; and provided further that such books and records of each licensed office shall be clearly segregated. Where the data processing for any licensee is performed by a person other than the licensee, the licensee shall provide to the Commissioner of Banks a copy of a binding agreement between the licensee and the data processor which allows the Commissioner of Banks, his deputy, or duly authorized examiner or agent or employee to examine that particular data processor's activities pertaining to the licensee to the same extent as if such services were being performed by the licensee on its own premises; and, notwithstanding the provisions of G.S. 53-167 and 53-122, when billed by the Commissioner of Banks, the licensee shall reimburse the Commissioner of Banks for all costs and expenses incurred by him in such examination.

(b) Each licensee shall file annually with the Commissioner of Banks on or before the thirty-first day of March for the 12 months' period ending the preceding December 31, reports on forms prescribed by the Commissioner. Such reports shall disclose in detail and under appropriate headings the

resources, assets and liabilities of such licensee at the beginning and at the end of the period, the income, expense, gain, loss, and a reconciliation of surplus or net worth with the balance sheets, the ratios of the profits to the assets reported, the monthly average number and amount of loans outstanding and a classification of loans made, by size and by security, and such other information as the Commissioner may require. Such reports shall be verified by the oath or affirmation of the owner, manager, president, vice-president, cashier, secretary or treasurer of such licensee.

(c) If a licensee conducts another business or is affiliated with other licensees under this Article, or if any other situation exists under which allocations of expense are necessary, the licensee or licensees shall make such allocation according to appropriate and reasonable accounting principles.

(d) If a licensee is affiliated with other licensees, all of the affiliated lenders shall file composite annual reports in addition to the separate reports required in subsection (b) of this section, in such form as the Commissioner may require. (1955, c. 1279; 1957, c. 1429, s. 4; 1961, c. 1053, s. 1; 1981, c. 561, s. 8.)

Effect of Amendments. — The 1981 amendment substituted "all books and records relating to loans made under this Article" for "in his local office all records" near the beginning of the first sentence of subsection (a) and added the remainder of subsection (a). Session Laws 1981, c. 561, s. 9, provides: "This act shall become effective 30 days after ratification and shall apply only to loans made after the

effective date of this act and before July 1, 1983. Unless the General Assembly shall provide otherwise before July 1, 1983, all rates of charge established by this act are repealed and all loans made on or after that date shall be made under the applicable rates of charge on the day before the effective date of this act." The act was ratified June 12, 1981.

§ 53-185. Rules and regulations by Banking Commission and Commissioner.

The State Banking Commission is hereby authorized, empowered and directed to make all rules and regulations deemed by the Commission to be necessary in implementing this Article and in providing for the protection of the borrowing public and the efficient management of such licensees and to give all necessary instructions to such licensees for the purpose of interpreting this Article; provided, the Commissioner is hereby authorized to make such rules and regulations and issue such orders as he deems necessary and desirable in implementing and carrying out the provisions of G.S. 53-184. And it shall be the duty of all such licensees, their officers, agents and employees, to comply fully with all such rules, regulations and instructions. When promulgated, any rule or regulation shall be forwarded by mail to each licensee at its licensed place of business at least 20 days prior to its effective date. (1955, c. 1279; 1961, c. 1053, s. 1.)

§ 53-186. Commissioner to issue subpoenas, conduct hearings, give publicity to investigations, etc.

The Commissioner of Banks shall have the power and duty to issue subpoenas including subpoenas duces tecum, and compel attendance of witnesses, administer oaths, conduct hearings and transcribe testimony in making the investigations and conducting the hearings provided for herein or in the other discharge of his duties, and to give such publicity to his investigations and findings as he may deem best for the public interest. (1957, c. 1429, s. 5; 1961, c. 1053, s. 1.)

§ 53-187. Injunctive powers; receivers.

Whenever the Commissioner has reasonable cause to believe that any person is violating or is threatening to violate any provision of this Article, he may in addition to all actions provided for in this Article, and without prejudice thereto, enter an order requiring such person to desist or to refrain from such violation; and an action may be brought in the name of the Commissioner on the relation of the State of North Carolina to enjoin such person from engaging in or continuing such violation or from doing any act or acts in furtherance thereof. In any such action an order or judgment may be entered awarding such preliminary or final injunction as may be deemed proper. In addition to all other means provided by law for the enforcement of a restraining order or injunction, the court in which such action is brought shall have power and jurisdiction to impound, and to appoint a receiver for the property and business of the defendant, including books, papers, documents and records pertaining thereto or so much thereof as the court may deem reasonably necessary to prevent violations of this Article through or by means of the use of said property and business. Such receiver, when appointed and qualified, shall have such powers and duties as to custody, collection, administration, winding up, and liquidation of such property and business as shall from time to time be conferred upon him by the court. (1957, c. 1429, s. 6; 1961, c. 1053, s. 1.)

§ 53-188. Review of regulations, order or act of Commission or Commissioner.

The Commission shall have full authority to review any rule, regulation, order or act of the Commissioner done pursuant to or with respect to the provisions of this Article and any person aggrieved by any such rule, regulation, order or act may appeal to the Commission for review upon giving notice in writing within 20 days after such rule, regulation, order or act complained of is adopted, issued or done. The validity of any rule, regulation, order or act of the Commission shall be subject to judicial review as provided in Chapter 150A of the General Statutes of North Carolina. (1957, c. 1429, s. 6; 1961, c. 1053, s. 1; 1973, c. 1331, s. 3.)

CASE NOTES

Cited in *State ex rel. North Carolina Util. Comm'n v. Old Fort Finishing Plant*, 264 N.C. 416, 142 S.E.2d 8 (1965).

§ 53-189. Insurance.

(a) Credit life and credit accident and health insurance may be written in accordance with the provisions of "The North Carolina Act for the Regulation of Credit Life Insurance and Credit Accident and Health Insurance." For single or joint life insurance written prior to July 1, 1982, pursuant to G.S. 53-189, such insurance may be written either level term or decreasing term for an initial amount not in excess of the total indebtedness and the refund of premiums for level term insurance shall be equal to the pro rata unearned gross premium if refunded during the first 60 days of the policy and equal to the sum of the digits formula known as the "Rule of 78" if refunded thereafter. The premium rate for level term credit life insurance written pursuant to this section shall not exceed one dollar and thirty-five cents (\$1.35) per hundred dollars (\$100.00) per year. For single or joint life insurance written on or after

July 1, 1982, pursuant to G.S. 53-189, the amount of insurance shall at no time exceed the actual or scheduled indebtedness and the refund of premiums for level term insurance shall be equal to the pro rata unearned gross premiums.

(b) The premium or cost of credit life, credit accident and health or property insurance, when written by or through any lender or other creditor, its affiliate, associate or subsidiary shall not be deemed as interest or charges or consideration or an amount in excess of permitted charges in connection with the loan or credit transaction and any gain or advantage to any lender or other creditor, its affiliate, associate or subsidiary, arising out of the premium or commission or dividend from the sale or provision of such insurance shall not be deemed a violation of any other law, general or special, civil or criminal, of this State, or of any rule, regulation or order issued by any regulatory authority of this State. (1961, c. 1053, s. 1; 1969, c. 1303, s. 25; 1975, c. 660, s. 2; 1981, c. 759, s. 10; c. 876.)

Cross References. — For the North Carolina Act for the Regulation of Credit Life Insurance and Credit Accident and Health Insurance, see § 58-341 et seq.

Editor's Note. — Session Laws 1975, c. 660, s. 5, provides that the effective date of the 1975 amendment, which rewrote this section, shall be 90 days after ratification. All credit life and credit accident and health insurance policies, delivered or issued for delivery on or after the effective date of this act shall conform to the provisions of this act. With regard to existing group credit insurance policies, the rates and forms shall be amended to conform to the requirements of this act, or be terminated, not later than the anniversary of the date of issue of the contract next following the effective date of this act. The act was ratified June 18, 1975.

Effect of Amendments. — The first 1981

amendment, effective Oct. 1, 1981, added all of subsection (a) following the first sentence. Session Laws 1981, c. 759, s. 11, provides: "This act shall become effective October 1, 1981. All credit life and credit accident and health insurance policies delivered or issued for delivery on or after the effective date of this act shall conform to the provisions of this act. With regard to existing group credit insurance policies, the rates and forms shall be amended to conform to the requirements of this act, or be terminated, not later than the anniversary of the date of issue of the contract next following the effective date of this act."

The second 1981 amendment inserted "during the first 60 days of the policy and equal to the sum of the digits formula known as the 'Rule of 78' if refunded" in the second sentence as added by the first 1981 amendment.

§ 53-190. Loans made elsewhere.

(a) No loan contract made outside this State in the amount or of the value of three thousand dollars (\$3,000) or less, for which greater consideration or charges than are authorized by G.S. 53-173 of this Article have been charged, contracted for, or received, shall be enforced in this State. Provided, the foregoing shall not apply to loan contracts in which all contractual activities, including solicitation, discussion, negotiation, offer, acceptance, signing of documents, and delivery and receipt of funds, occur entirely outside North Carolina.

(b) If any lender or agent of a lender who makes loan contracts outside this State in the amount or of the value of three thousand dollars (\$3,000) or less, comes into this State to solicit or otherwise conduct activities in regard to such loan contracts, then such lender shall be subject to the requirements of this Article.

(c) No lender licensed to do business under this Article may collect, or cause to be collected, any loan made by a lender in another state to a borrower, who was a legal resident of North Carolina at the time the loan was made. The purchase of a loan account shall not alter this prohibition. (1961, c. 1053, s. 1; 1967, c. 769, s. 2; 1969, c. 1303, s. 13; 1973, c. 1042, s. 8; 1979, c. 706, s. 2.)

Legal Periodicals. — For note on choice of law rules in North Carolina, see 48 N.C.L. Rev. 243 (1970).

§ 53-191. Businesses exempted.

Nothing in this Article shall be construed to apply to any person, firm or corporation doing business under the authority of any law of this State or of the United States relating to banks, trust companies, savings and loan associations, cooperative credit unions, agricultural credit corporations or associations organized under the laws of North Carolina, production credit associations organized under the act of Congress known as the Farm Credit Act of 1933, pawnbrokers lending or advancing money on specific articles of personal property, industrial banks, the business of negotiating loans on real estate as defined in G.S. 105-41, nor to installment paper dealers as defined in G.S. 105-83 other than persons, firms and corporations engaged in the business of accepting fees for endorsing or otherwise securing loans or contracts for repayment of loans. (1955, c. 1279; 1957, c. 1429, s. 8; 1961, c. 1053, s. 1; 1969, c. 1303, s. 26.)

Legal Periodicals. — For comment on usury law in North Carolina, see 47 N.C.L. Rev. 761 (1969).

CASE NOTES

Cited in *Northcutt v. Clayton*, 269 N.C. 428, 152 S.E.2d 471 (1967).

ARTICLE 16.

Sale of Checks Act.

§ 53-192. Citation of Article.

This Article shall be known and may be cited as the "Sale of Checks Act." (1963, c. 1251, s. 1.)

§ 53-193. Definitions.

For the purpose of this Article:

- (1) "Person" means any individual, partnership, association, joint stock association, trust or corporation;
- (2) "Licensee" means any person duly licensed by the Commissioner pursuant to this Article;
- (3) "Check" means any check, draft, money order or other instrument for the transmission or payment of money;
- (4) "Commissioner" means the Commissioner of Banks of the State of North Carolina. (1963, c. 1251, s. 2.)

§ 53-194. License required to sell or issue checks; exception.

No person shall sell or issue checks in this State as a service or for a fee or other consideration without first obtaining a license from the Commissioner pursuant to the provisions of this Article, provided, however, that this Article

shall not apply to the receipt of money by an incorporated telegraph company at any office or agency of such company for immediate transmission by telegraph. (1963, c. 1251, s. 3.)

§ 53-195. Exemptions.

Nothing in this Article shall apply to the sale or issuance of checks by:

- (1) Corporations organized under the general banking laws of this State or of the United States.
- (2) The government of the United States or any department or agency thereof.
- (3) Savings and loan associations organized under the laws of this State or of the United States. (1963, c. 1251, s. 4.)

§ 53-196. Form and contents of license applications.

Each application for a license to sell or issue checks in this State shall be made in writing and under oath to the Commissioner in such form as he may prescribe. The application shall state the full name and business address of

- (1) The proprietor, if the applicant is an individual;
- (2) Every member, if the applicant is a partnership or association, except that if the applicant is a joint stock association having 50 or more members the name and business address need be given only of the association and each officer and director thereof;
- (3) The corporation and each officer and director thereof, if the applicant is a corporation. (1963, c. 1251, s. 5.)

§ 53-197. Investigation fee.

Each application for a license shall be accompanied by an investigation fee of five hundred dollars (\$500.00). If the license is granted, the investigation fee shall be applied to the license fee for the first year. No investigation fee shall be refunded. (1963, c. 1251, s. 6.)

CASE NOTES

Cited in *Mathis v. Minnesota Mut. Life Ins. Co.*, 302 F. Supp. 998 (M.D.N.C. 1969).

§ 53-198. Approved applicants to furnish surety bonds; lists of locations; cancellation of bonds.

Each approved applicant shall furnish a corporate surety bond in the principal sum of one hundred and fifty thousand dollars (\$150,000) and an additional principal sum of five thousand dollars (\$5,000) for each location within this State at which checks of the licensee are issued or sold, but in no event shall the bond be required to be in excess of two hundred and fifty thousand dollars (\$250,000). Each application for a license or for the renewal of a license shall be accompanied by a list of the locations, including agencies, at which the applicant engages in the business of selling checks in this State. The bond shall be conditioned that the obligor will faithfully conform to and abide by the provisions of this Article and will honestly and faithfully apply all funds received and perform all obligations issued and sold under this Article and will pay to the State and to any person entitled thereto all money that becomes due and owing to the State or to such person under the provisions of this Article

because of any checks issued or sold in this State by such licensee or his agent or employee. The bond shall remain in force and effect until canceled by the surety, which cancellation may be had only upon 30 days' written notice to the Commissioner. Such cancellation shall not affect any liability incurred or accrued prior to the termination of such 30-day period. (1963, c. 1251, s. 7.)

§ 53-199. Requiring additional bonds; deposits in lieu of bonds.

(a) If the Commissioner shall find at any time that any bond required under this Article is insecure, insufficient or exhausted, an additional bond to be approved by the Commissioner shall be filed by the licensee within 10 days after written demand therefor by the Commissioner.

(b) In lieu of any bond required under this Article, the licensee may deposit with the Commissioner securities with a par value equal to the amount of any such bond. Such securities shall consist of

- (1) General obligations of or fully guaranteed by the United States or of any agency or instrumentality of or corporation wholly owned by the United States directly or indirectly; or
- (2) Direct general obligations of the State of North Carolina, or of any county, city, town, or other political subdivision or municipal corporation of the State of North Carolina.

Such securities shall be held by the Commissioner to secure the same obligation as would any bond required by this Article. The securities so deposited may be exchanged from time to time for other securities receivable as aforesaid. All said securities shall be subject to sale and transfer and to the disposal of the proceeds by said Commissioner only on the order of a court of competent jurisdiction. So long as the licensee so depositing shall continue solvent, and is not in violation of any of the provisions of this Article, such licensee shall be permitted to receive the interest or dividends on said deposit. The Commissioner shall provide for custody of such securities by any qualified trust company or bank located in the State of North Carolina or by any federal reserve bank. The compensation, if any, of the custodian for acting as such under this section shall be paid by the depositing licensee. (1963, c. 1251, s. 8.)

§ 53-200. Investigation of applicants; issuance of licenses.

Upon the filing of the application, the payment of the investigation fee and the approval by the Commissioner of the bond or securities delivered pursuant to G.S. 53-198 or 53-199, the Commissioner shall investigate the financial responsibility, financial and business experience, character and general fitness of the applicant and, if he deems it advisable, of its officers and directors, and, if he finds these factors and qualities meet the requirements of this Article and are such as to warrant the belief that the applicant's business will be conducted honestly, fairly, equitably, carefully and efficiently and in a manner commanding the confidence and trust of the community, he shall issue to the applicant a license to sell and issue checks subject to the provisions of this Article. (1963, c. 1251, s. 9.)

§ 53-201. Minimum net worth of licensees.

Each licensee under this Article shall at all times maintain a minimum net worth of at least one hundred thousand dollars (\$100,000). (1963, c. 1251, s. 10.)

§ 53-202. License fees.

Each licensee shall pay to the Commissioner within five days after the issuance of the license, and annually thereafter on or before June 30 of each year, a license fee of five hundred dollars (\$500.00). (1963, c. 1251, s. 11.)

§ 53-203. More than one location authorized; employees, agents and representatives.

Each licensee may conduct business at one or more locations within this State and through or by means of such employees, agents, subagents or representatives as such licensee may from time to time designate and appoint. No license under this Article shall be required of any such employee, agent, subagent or representative who is acting for or on behalf of a licensee hereunder in the sale of checks of which the licensee is the issuer. Each such agent, subagent or representative shall upon demand transfer and deliver to the licensee the proceeds of the sale of licensee's checks less the fees, if any, due such agent, subagent or representative. (1963, c. 1251, s. 12.)

§ 53-204. Annual lists of locations and agents; annual financial statements; audits.

Each licensee shall file with the Commissioner annually on or before June 30 of each year a statement listing the locations of the offices of the licensee and the names and locations of the agents or subagents authorized by the licensee to engage in the sale of checks of which the licensee is the issuer and shall also file a statement correctly reflecting its net worth as of the close of its most recent fiscal year, such statement to be certified to by a certified public accountant satisfactory to the Commissioner. The Commissioner may conduct or cause to be conducted an examination or audit of the books and records of any licensee at any time or times he shall deem proper, the cost of such examination or audit to be borne by the licensee. The refusal of access to such books and records shall be cause for the revocation of license. (1963, c. 1251, s. 13.)

§ 53-205. Exempt agents need not be listed.

Nothing in this Article shall be deemed to require a licensee to list agents which are exempted by the provisions of G.S. 53-195 of this Article. (1963, c. 1251, s. 14.)

§ 53-206. Notice of denial or revocation of license; hearing; appeal.

No license shall be denied or revoked except on 10 days' notice to the applicant or licensee. Upon receipt of such notice the applicant or licensee may, within five days of such receipt, make written demand for a hearing. The Commissioner shall thereafter, with reasonable promptness, hear and determine the matter as provided by law and his decision shall be subject to judicial review in the Superior Court of Wake County as provided by law. (1963, c. 1251, s. 15.)

§ 53-207. Grounds for revoking licenses.

The Commissioner may at any time revoke a license on any ground on which he might refuse to grant a license or for failure to pay an annual fee or for the violation of any provision of this Article. (1963, c. 1251, s. 16.)

§ 53-208. Violation a misdemeanor.

If any person to whom or to which this Article applies or any agent, subagent or representative of such person violates any of the provisions of this Article or attempts to sell or issue checks without having first obtained a license from the Commissioner pursuant to the provisions of this Article, or issues any check at a time when the bond or security required by this Article is not in full force and effect, such person or such agent, subagent or representative shall be deemed guilty [of] a misdemeanor, and upon conviction shall be fined or imprisoned within the discretion of the court and each violation shall constitute a separate offense. (1963, c. 1251, s. 17.)

Chapter 53A.

Business Development Corporations.

Sec.

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§ 53A-1. Definitions.

As used in this Chapter, the following words and phrases, unless differently defined or described, shall have the meanings and references as follows:

- (1) "Board of directors": the board of directors of the corporation created under this Chapter.
- (2) "Corporation": a North Carolina business development corporation created under this Chapter.
- (3) "Financial institution": any banking corporation or trust company, building and loan association, insurance company or related corporation, partnership, foundation, or other institution engaged primarily in lending or investing funds.
- (4) "Loan limit": for any member, the maximum amount permitted to be outstanding at one time on loans made by such member to the corporation, as determined under the provisions of this Chapter.
- (5) "Member": any financial institution authorized to do business within this State which shall undertake to lend money to a corporation created under this Chapter, upon its call, and in accordance with the provisions of this Chapter. (1955, c. 1146, s. 1.)

§ 53A-2. Incorporation authorized; information to be set forth; purposes; powers generally.

(a) Incorporation; Information Required; Purposes. — Twenty-five or more persons, a majority of whom shall be residents of this State, who may desire to create a business development corporation under the provisions of this Chapter, for the purpose of promoting, developing and advancing the prosperity and economic welfare of the State and, to that end, to exercise the powers and privileges hereinafter provided, may be incorporated in the following manner; such persons shall, by certificate of incorporation filed with the Secretary of State, under their hands and seals, set forth:

- (1) The name of the corporation, which shall include the words "Business Development Corporation of North Carolina";

- (2) The location of the principal office of the corporation, but such corporation may have offices in such other places within the State as may be fixed by the board of directors;
- (3) The purpose for which the corporation is founded, which shall include the following:

The purposes of the corporation shall be to promote, stimulate, develop and advance the business prosperity and economic welfare of the State of North Carolina and its citizens; to encourage and assist through loans, investments or other business transactions, in the location of new business and industry in this State and to rehabilitate and assist existing business and industry; and so to stimulate and assist in the expansion of all kinds of business activity which will tend to promote the business development and maintain the economic stability of this State, provide maximum opportunities for employment, encourage thrift, and improve the standard of living of the citizens of this State; similarly, to cooperate and act in conjunction with other organizations, public or private, in the promotion and advancement of industrial, commercial, agricultural and recreational developments in this State; and to provide financing for the promotion, development, and conduct of all kinds of business activity in this State.

(b) Powers Generally. — In furtherance of such purposes and in addition to the powers conferred on business corporations by the provisions of Chapter 55 of the General Statutes the corporation shall, subject to the restrictions and limitations herein contained, have the following powers:

- (1) To elect, appoint and employ officers, agents and employees; to make contracts and incur liabilities for any of the purposes of the corporation; provided, that the corporation shall not incur any secondary liability by way of guaranty or endorsement of the obligations of any person, firm, corporation, joint-stock company, association or trust, or in any other manner.
- (2) To borrow money from the members, from any financial institution, and from any agency established under the Small Business Investment Act of 1958, Public Law 85-699 — 85th Congress, or other similar federal legislation, for any of the purposes of the corporation; to issue therefor its bonds, debentures, notes or other evidences of indebtedness, whether secured or unsecured, and to secure the same by mortgage, pledge, deed of trust or other lien on its property, franchises, rights and privileges of every kind and nature or any part thereof or interest therein, without securing stockholder or member approval; provided, that no loan to the corporation shall be secured in any manner unless all outstanding loans to the corporation shall be secured equally and ratably in proportion to the unpaid balance of such loans and in the same manner.
- (3) To make loans to any person, firm, corporation, joint-stock company, association or trust, and to establish and regulate the terms and conditions with respect to any such loans and the charges for interest and service connected therewith; provided, however, that the corporation shall not approve any application for a loan unless and until the person applying for said loan shall show that he has applied for the loan through ordinary banking channels and that the loan has been refused by at least one bank or other financial institution.
- (4) To purchase, receive, hold, lease, or otherwise acquire, and to sell, convey, transfer, lease or otherwise dispose of real and personal property, together with such rights and privileges as may be incidental and appurtenant thereto and the use thereof, including, but not restricted to, any real or personal property acquired by the corporation

from time to time in the satisfaction of debts or enforcement of obligations.

- (5) To acquire the goodwill, business, rights, real and personal property, and other assets, or any part thereof, or interest therein, of any persons, firms, corporations, joint-stock companies, associations or trusts, and to assume, undertake, or pay the obligations, debts and liabilities of any such person, firm, corporation, joint-stock company, association or trust; to acquire improved or unimproved real estate for the purpose of constructing industrial plants or other business establishments thereon or for the purpose of disposing of such real estate to others for the construction of industrial plants or other business establishments; and to transfer, lease, or otherwise dispose of industrial plants or business establishments.
- (6) To acquire, subscribe for, own, hold, sell, assign, transfer, mortgage, pledge or otherwise dispose of the stock, shares, bonds, debentures, notes or other securities and evidences of interest in, or indebtedness of, any person, firm, corporation, joint-stock company, association or trust, and while the owner or holder thereof to exercise all the rights, powers and privileges of ownership, including the right to vote thereon.
- (7) To mortgage, pledge, or otherwise encumber any property, right or thing of value, acquired pursuant to the powers contained in subdivisions (4), (5) or (6) of this subsection, as security for the payment of any part of the purchase price thereof.
- (8) To cooperate with and avail itself of the facilities of the Department of Natural Resources and Community Development and any similar governmental agencies; and to cooperate with and assist, and otherwise encourage organizations in the various communities of the State in the promotion, assistance, and development of the business prosperity and economic welfare of such communities or of this State or of any part thereof.
- (9) To do all acts and things necessary or convenient to carry out the powers expressly granted in this Chapter. (1955, c. 1146, s. 2; 1959, c. 613, s. 1; 1973, c. 1262, s. 86; 1977, c. 771, s. 4.)

Editor's Note. — Session Laws 1959, c. 613, s. 2, provides that nothing contained therein shall change or affect in any way the provisions of the certificate of incorporation of any

existing corporation organized under this Chapter unless and until such certificate of incorporation shall be amended as provided in § 53A-9.

§ 53A-3. Capital stock; provisions of certificates of incorporation.

The certificate shall set forth the amount of total authorized capital stock and the number of shares in which it is divided, the par value of each share, and the amount of capital stock with which it will commence business and, if there is more than one class of stock, a description of the different classes, and the names and post-office addresses of the subscribers of stock and the number of shares subscribed by each. The aggregate of the subscription shall be the amount of capital with which the corporation will commence business. The certificate of incorporation may also contain any provision consistent with the laws of this State for the regulation of the affairs of the corporation or creating, defining, limiting, and regulating its powers. The certificate of incorporation shall be in accordance with the provisions of G.S. 55-3. (1955, c. 1146, s. 3.)

Editor's Note. — Former § 55-3, referred to at the end of this section, set out the requirements for articles of incorporation. The present requirements are to be found in present § 55-7.

§ 53A-4. Approval and filing of certificates; authority of incorporators.

Before the said certificate of incorporation shall become effective, it must be approved by a resolution adopted by the Governor and Council of State and, from the date the said certificate of incorporation is filed in the office of the Secretary of State, with such approval, the stock subscribers, their successors and assigns, shall become a body corporate, by the name specified in the certificate, subject to amendment and dissolution as provided in this Chapter. The incorporators shall have the authority and shall perform such acts and things as required by the provisions of this Chapter, as set forth in G.S. 53A-2. (1955, c. 1146, s. 4.)

§ 53A-5. Acquisition, etc., of corporation's securities and stock; financial institutions becoming members; limitation on stock acquired by members.

Notwithstanding any rule at common law or any provision of any general or special law or any provision in their respective charters, agreements of association, articles of organization, or trust indentures:

- (1) All domestic corporations organized for the purpose of carrying on business within this State including without implied limitation any public utility companies and insurance and casualty companies and foreign corporations licensed to do business in this State, and all trusts, are hereby authorized to acquire, purchase, hold, sell, assign, transfer, mortgage, pledge or otherwise dispose of any bonds, securities or other evidences of indebtedness created by, or the shares of the capital stock of, the corporation, and while owners of said stock to exercise all the rights, powers and privileges of ownership, including the right to vote thereon, all without the approval of any regulatory authority of the State;
- (2) All financial institutions are hereby authorized to become members of the corporation and to make loans to the corporation as provided herein;
- (3) A financial institution which does not become a member of the corporation shall not be permitted to acquire any shares of the capital stock of the corporation; and
- (4) Each financial institution which becomes a member of the corporation is hereby authorized to acquire, purchase, hold, sell, assign, transfer, mortgage, pledge, or otherwise dispose of, any bonds, securities or other evidences of indebtedness created by, or the shares of the capital stock of the corporation, and while owners of said stock to exercise all the rights, powers and privileges of ownership, including the right to vote thereon, all without the approval of any regulatory authority of the State; provided, that the amount of the capital stock of the corporation which may be acquired by any member pursuant to the authority granted herein shall not exceed ten percent (10%) of the loan limit of such member. The amount of capital stock of the corporation which any member is authorized to acquire pursuant to the authority granted herein is in addition to the amount of capital stock in corporations which such member may otherwise be authorized to acquire. (1955, c. 1146, s. 5.)

§ 53A-6. Applications for membership in corporation; acceptance; loans to corporation by members.

Any financial institution may request membership in the corporation by making application to the board of directors on such form and in such manner as said board of directors may require, and membership shall become effective upon acceptance of such application by said board.

Each member of the corporation shall make loans to the corporation as and when called upon by it to do so on such terms and other conditions as shall be approved from time to time by the board of directors, subject to the following conditions:

- (1) All loan limits shall be established at the thousand-dollar amount nearest to the amount computed in accordance with the provisions of this section.
- (2) No loan to the corporation shall be made if immediately thereafter the total amount of the obligations of the corporation would exceed 10 times the capital of the corporation. For the purposes of this paragraph, the capital of the corporation shall include the amount of the outstanding capital stock of the corporation, whether common or preferred, the earned or paid-in surplus of the corporation, and the amount of any outstanding debentures of the corporation, the payment of which is subordinated to all obligations of the corporation other than the obligations of the corporation to the holders of its capital stock.
- (3) The total amount outstanding on loans to the corporation made by any member at any one time, when added to the amount of the investment in the capital stock of the corporation then held by such member, shall not exceed:
 - a. Twenty percent (20%) of the total amount then outstanding on loans to the corporation by all members, including in said total amount outstanding, amounts validly called for loan but not yet loaned.
 - b. The following limit, to be determined as of the time such member becomes a member or at any time requested by a member on the basis of the audited balance sheet of such member at the close of its fiscal year immediately preceding its application for membership, or, in the case of an insurance company, its last annual statement to the Commissioner of Insurance: a minimum of two percent (2%) to a maximum of four percent (4%) of the capital and surplus of commercial banks and trust companies, the percentage within such limits to be determined by such member; a minimum of one half of one percent (.5 of 1%) to a maximum of one percent (1%) of the total outstanding loans made by a building and loan or savings and loan association, the percentage within such limits to be determined by such member; a minimum of one percent (1%) to a maximum of two percent (2%) of the capital and unassigned surplus of stock insurance companies, except fire insurance companies, the percentage within such limits to be determined by such member; a minimum of one percent (1%) to a maximum of two percent (2%) of the unassigned surplus of mutual insurance companies, except fire insurance companies, the percentage within such limits to be determined by such member; one tenth of one percent (.1 of 1%) of the assets of fire insurance companies; and such limits as may be approved by the board of directors of the corporation for other financial institutions.

- (4) Subject to subdivision (3)a of this section, each call made by the corporation shall be prorated among the members of the corporation in substantially the same proportion that the adjusted loan limit of each member bears to the aggregate of the adjusted loan limits of all members. The adjusted loan limit of a member shall be the amount of such member's loan limit, reduced by the balance of outstanding loans made by such member to the corporation and the investment in capital stock of the corporation held by such member at the time of such call.
- (5) All loans to the corporation by members shall be evidenced by bonds, debentures, notes or other evidences of indebtedness of the corporation, which shall be freely transferable at all times and which shall bear interest at a rate negotiated by the board of directors. (1955, c. 1146, s. 6; 1957, c. 1041, s. 1; 1963, c. 393, ss. 1, 2; 1981, c. 229.)

Editor's Note. — Session Laws 1963, c. 393, s. 3, provides that nothing contained in the 1963 amendment to this section, which rewrote subdivision (2) and paragraph b of subdivision (3), shall change or affect in any way the provisions of the certificate of incorporation of any existing corporation organized under this Chapter unless and until such certificate of incorporation shall be amended as provided in § 53A-9.

Effect of Amendments. — The 1981 amendment, in subdivision (5), substituted "negotiated by the board of directors" for "of not less than one quarter of one percent (.25 of 1%) in excess of the rate of interest determined by the board of directors to be the prime rate prevailing at the date of issuance thereof on unsecured commercial loans."

§ 53A-7. Term of membership; withdrawal.

Membership in the corporation shall be for the duration of the corporation; provided that —

Upon written notice given to the corporation three years in advance, a member may withdraw from membership in the corporation at the expiration date of such notice.

A member shall not be obligated to make any loans to the corporation pursuant to calls made subsequent to the withdrawal of said member. (1955, c. 1146, s. 7; 1957, c. 1041, s. 4.)

Editor's Note. — Session Laws 1957, c. 1041, s. 5 provides that nothing contained in the 1957 amendment to this section, which substituted "three" for "five," shall be construed to change or affect in any way the provisions of the

certificate of incorporation of any existing corporation organized under this Chapter with respect to requirements to amend its certificate of incorporation.

§ 53A-8. Powers of stockholders and members; voting.

The stockholders and the members of the corporation shall have the following powers of the corporation:

- (1) To determine the number of and elect directors as provided in G.S. 53A-10;
- (2) To make, amend and repeal bylaws;
- (3) To amend this charter as provided in G.S. 53A-9;
- (4) To exercise such other of the powers of the corporation as may be conferred on the stockholders and the members by the bylaws.

As to all matters requiring action by the stockholders and the members of the corporation, said stockholders and said members shall vote separately thereon by classes, and, except as otherwise herein provided, such matters shall require the affirmative vote of a majority of the votes to which the stockholders present or represented at the meeting shall be entitled and the affirmative vote of a majority of the votes to which the members present or represented at the meeting shall be entitled.

Each stockholder shall have one vote, in person or by proxy, for each share of capital stock held by him, and each member shall have one vote, in person or by proxy, except that any member having a loan limit of more than one thousand dollars (\$1,000) shall have one additional vote, in person or by proxy, for each additional one thousand dollars (\$1,000) which such member is authorized to have outstanding on loans to the corporation at any one time as determined under subdivision (3)b of G.S. 53A-6. (1955, c. 1146, s. 8.)

§ 53A-9. Amendment of charter.

This charter may be amended by the votes of the stockholders and the members of the corporation, voting separately by classes, and such amendments shall require approval by the affirmative vote of two thirds of the votes to which the stockholders shall be entitled and two thirds of the votes to which the members shall be entitled; provided, that no amendment of this charter which is inconsistent with the general purposes expressed herein or which authorizes any additional class of capital stock to be issued, or which eliminates or curtails the right of the Secretary of State to examine the corporation or the obligation of the corporation to make reports as provided in G.S. 53A-13, shall be made without amendment of this Chapter; and provided, further, that no amendment of this charter which increases the obligation of a member to make loans to the corporation, or makes any change in the principal amount, interest rate, maturity date, or in the security or credit position, of any outstanding loan of a member to the corporation, or affects a member's right to withdraw from membership as provided in G.S. 53A-7, or affects a member's voting rights as provided in G.S. 53A-8, shall be made without the consent of each member affected by such amendment.

Within 120 days after any meeting at which amendment of this charter has been adopted, articles of amendment signed and sworn to by the president, treasurer and a majority of the directors, setting forth such amendment and the due adoption thereof, shall be submitted to the Secretary of State, who shall examine them and if he finds that they conform to the requirements of this Chapter, shall so certify and endorse his approval thereon. Thereupon, the articles of amendment shall be filed in the office of the Secretary of State and no such amendment shall take effect until such articles of amendment shall have been filed as aforesaid. (1955, c. 1146, s. 9; 1963, c. 393, s. 3½.)

Editor's Note. — Session Laws 1957, c. 1041, s. 5 provides that nothing contained in the 1957 amendments to §§ 53A-6, 53A-7, 53A-10 and 53A-15 shall be construed to change or affect in any way the provisions of the

certificate of incorporation of any existing corporation organized under this Chapter with respect to requirements to amend its certificate of incorporation.

§ 53A-10. Board of directors; officers and agents.

The business and affairs of the corporation shall be managed and conducted by a board of directors, a president and treasurer, and such other officers and such agents as the corporation by its bylaws shall authorize. The board of directors shall consist of such number, not less than 15 nor more than 21, as shall be determined in the first instance by the incorporators and thereafter annually by the members and the stockholders of the corporation. The board of directors may exercise all the powers of the corporation except such as are conferred by law or by the bylaws of the corporation upon the stockholders or members and shall choose and appoint all the agents and officers of the corporation and fill all vacancies except vacancies in the office of director which shall be filled as hereinafter provided. The board of directors shall be elected as hereinafter provided. The board of directors shall be elected in the first

instance by the incorporators and thereafter at each annual meeting of the corporation, or, if no annual meeting shall be held in any year at the time fixed by the bylaws, at a special meeting held in lieu of the annual meeting. At each annual meeting, or at each special meeting held in lieu of the annual meeting, the members of the corporation shall elect two thirds of the board of directors and the stockholders shall elect the remaining directors. The directors shall hold office until the next annual meeting of the corporation or special meeting held in lieu of the annual meeting after their election and until their successors are elected and qualified unless sooner removed in accordance with the provisions of the bylaws. Any vacancy in the office of a director elected by the members shall be filled by the directors elected by the members, and any vacancy in the office of a director elected by the stockholders shall be filled by the directors elected by the stockholders.

Directors and officers shall not be responsible for losses unless the same shall have been occasioned by the wilful misconduct of such directors and officers. (1955, c. 1146, s. 10; 1957, c. 1041, s. 2.)

Editor's Note. — Session Laws 1957, c. 1041, s. 5 provides that nothing contained in the 1957 amendment to this section, which substituted "21" for "18," shall be construed to change or affect in any way the provisions of the

certificate of incorporation of any existing corporation organized under this Chapter with respect to requirements to amend its certificate of incorporation.

§ 53A-11. Earned surplus requirements; determination of net earnings and surplus.

Each year the corporation shall set apart as earned surplus not less than ten percent (10%) of its net earnings for the preceding fiscal year until such surplus shall be equal in value to one half of the amount paid in on the capital stock then outstanding. Whenever the amount of surplus established herein shall become impaired, it shall be built up again to the required amount in the manner provided for its original accumulation. Net earnings and surplus shall be determined by the board of directors, after providing for such reserves as said directors deem desirable, and the directors' determination made in good faith shall be conclusive on all persons. (1955, c. 1146, s. 11.)

§ 53A-12. Deposits by corporation in banking institutions; corporation not to receive deposits.

The corporation shall not deposit any of its funds in any banking institution unless such institution has been designated as a depository by a vote of a majority of the directors present at an authorized meeting of the board of directors, exclusive of any director who is an officer or director of the depository so designated.

The corporation shall not receive money on deposit. (1955, c. 1146, s. 12.)

§ 53A-13. Examinations and reports.

The corporation shall be subject to the examination of the Commissioner of Banks, and shall make reports of its condition not less than annually to said Commissioner, who in turn shall make copies of such reports available to the Commissioner of Insurance and to the Governor, and the corporation shall also furnish such other information as may from time to time be required by the Secretary of State. (1955, c. 1146, s. 13.)

§ 53A-14. First meeting.

The first meeting of the corporation shall be called by a notice signed by three or more of the incorporators, stating the time, place and purpose of the meeting, a copy of which notice shall be mailed, or delivered, to each incorporator at least five days before the day appointed for the meeting. Said first meeting may be held without such notice upon agreement in writing to that effect signed by all the incorporators. There shall be recorded in the minutes of the meeting a copy of said notice or of such unanimous agreement of the incorporators.

At such first meeting the incorporators shall organize by the choice, by ballot, of a temporary clerk, by the adoption of bylaws, by the election by ballot of directors, and by action upon such other matters within the powers of the corporation as the incorporators may see fit. The temporary clerk shall be sworn and shall make and attest a record of the proceedings. Ten of the incorporators shall be a quorum for the transaction of business. (1955, c. 1146, s. 14.)

§ 53A-15. Tax exemptions and credits.

(a) An annual excise tax is hereby levied on every corporation organized under this Chapter for the privilege of transacting business in this State during the calendar year, according to or measured by its entire net income as defined herein received or accrued from all sources during the preceding calendar year hereinafter referred to as taxable year, at the rate of four and one-half percent ($4\frac{1}{2}\%$) of such entire net income. The minimum tax assessable to any one such corporation shall be ten dollars (\$10.00). The liability for the tax imposed by this section shall arise upon the first day of each calendar year, and shall be based upon and measured by the entire net income of each such corporation for the preceding calendar year, including all income received from government securities (whether or not taxable under Article 4 of the Revenue Act) in such year except for any interest that may be allowed as deductible from gross income under subsection (e) of this section. As used in this section the words "taxable year" shall mean the calendar year next preceding the calendar year for which and during which the excise tax is levied.

(b) The excise tax levied under subsection (a) of this section shall be in lieu of the intangible personal property taxes, the State franchise tax, and the State income tax levied by the Revenue Act.

It is the purpose and intent of the General Assembly to levy taxes on corporations organized pursuant to this Chapter so that all such corporations will be taxed uniformly in a just and equitable manner in accordance with the provisions of Article V, § 3, of the Constitution of North Carolina. The intent of this section is to exercise the powers of classification and of taxation on property, franchises, and trades conferred by the above constitutional provisions cited in this section.

(c) The words "entire net income" shall mean the gross income of a taxpayer less the deductions allowed by this section.

(d) For purposes of this section the words "gross income" shall mean the income of a corporation received or accrued from whatever source during the taxable years as follows: interest and discount on loans; interest from bonds, notes, mortgages and other investments, including interests from all government bonds issued direct by any level of government or through any government agency, any exclusion provided in Article 4 of Chapter 105 of the General Statutes notwithstanding; dividends from securities owned; service charges; collection fees; rents; commissions; gains or profits from the sale or other disposition of property, either real or personal, tangible or intangible; recoveries from losses previously written off or deducted from income in prior taxable

years; and all other recoveries, gains, profits, income, or receipts regardless of nature and from whatever source derived, except that gifts received shall be excluded from gross income.

(e) In computing entire net income there shall be allowed as deductions the following items:

- (1) All ordinary and necessary expenses paid or accrued during the taxable year.
- (2) Rental expense paid or accrued during the taxable year.
- (3) All unearned discount and interest paid during the taxable year except interest paid in connection with income exempt from taxation under Article 4 of Chapter 105 of the General Statutes and except interest deemed excessive under G.S. 105-130.6.
- (4) Taxes paid or accrued except taxes based on net income, taxes assessed for local benefit of a kind tending to increase the value of the property assessed and any other taxes not deductible for corporate income tax purposes under Division I of Article 4 of Chapter 105 of the General Statutes.
- (5) Dividends received from stock issued by any corporation to the extent provided in G.S. 105-130.7.
- (6) Net economic losses to the extent provided in G.S. 105-130.8 and other losses as provided in Division I of Article 4 of Chapter 105 of the General Statutes.
- (7) Loans or debts ascertained to be worthless and actually charged off during the taxable year, if connected with business and if the amount has previously been included in gross income in a return under this section; or, in the discretion of the Secretary of Revenue, a reasonable addition to a reserve for bad debts. Provided, that amounts which are deductible for federal income tax purposes shall be prima facie allowable hereunder.
- (8) A reasonable allowance for depreciation and obsolescence to the extent provided for corporation income tax purposes in Division I of Article 4 of Chapter 105 of the General Statutes.
- (9) Contributions to religious, charitable, educational, literary and like organizations to the extent provided in subdivision (1) of G.S. 105-130.9.
- (10) Contributions to the State of North Carolina, any of its institutions, instrumentalities, agencies, or political subdivisions, and contributions to educational institutions located within North Carolina as provided in subdivision (2) of G.S. 105-130.9.
- (11) Reasonable contributions to qualified employees' pension trusts within the taxable year; provided, exemption of any such trust under the federal income tax laws shall constitute prima facie evidence that it is a "qualified employees' pension trust" within the meaning of this subdivision.
- (12) Premiums paid upon the purchase of bonds to the following extent:
 - a. Amortization of bond premiums on tax-exempt bonds shall be mandatory for all taxpayers. Amortization for the taxable year shall be accomplished by lowering the basis or adjusted basis of the bond with no deduction against gross income for the year.
 - b. For purposes of this subsection, the term "bond" means any bond, debenture, note, or certificate or other evidence of indebtedness issued by any corporation and bearing interest and includes any like obligation issued by any government or political subdivision thereof.
- (13) Interest upon the obligations of the State of North Carolina or a political subdivision thereof received or accrued during the taxable year. Provided, that the deduction of accrued interest shall be

permitted only if the taxpayer has included accrued income in his gross income for the taxable year. Provided further that in the event that any court of competent jurisdiction shall rule that the deduction of the interest of the obligations of the State of North Carolina or a political subdivision thereof from the base of the tax levied by this article violates the Constitution of this State or the Constitution of the United States, such deduction shall be disallowed and such interest shall be included in the entire net income of the taxpayer.

- (14) Reasonable payments made to the beneficiaries or to the estate of a deceased employee, paid by reason of the death of the employee to the extent provided for corporate income tax purposes in Division I of Article 4 of Chapter 105 of the General Statutes.
- (15) Deduction of accrued expenses, contributions, taxes, rental expense, or interest expense shall be subject to the limitations imposed upon corporate income taxpayers by Article 4 of Chapter 105 of the General Statutes.

(f) On or before June 1 of each year, the executive officer or officers of each corporation shall file with the Secretary of Revenue a full and accurate report of all income as defined in subsection (d) of this section received or accrued during the taxable year, and also an accurate record of the legal deductions in the same calendar year as allowed by subsection (e) of this section to the end that the correct entire net income of the corporation may be determined. This report shall be in such form and contain such information as the Secretary of Revenue may specify. At the time of making such report by each corporation, the taxes levied by this section with respect to an excise tax on corporations organized pursuant to this Chapter shall be paid to the Secretary of Revenue.

(g) The initial report and payment for each corporation shall be made on June 1, 1957, and shall be based on the calendar year of 1956, and the provisions of this section shall be applicable with respect to the year 1956 and all subsequent years.

(h) All provisions of Subchapter I of Chapter 105 of the General Statutes, not inconsistent with this section, relating to administration, auditing and making returns, the imposition and collection of tax and the lien thereof, assessments, refunds, penalties, and appeal and review, shall be applicable to the tax imposed by this section. The Secretary of Revenue, may, from time to time, make, prescribe, and publish such rules and regulations, not inconsistent with law, as may be needful to enforce the provisions of this section.

(i) The securities, evidences of indebtedness and shares of the capital stock issued by the corporation established under the provisions of this Chapter, their transfer, and income therefrom, and deposits of financial institutions invested therein, shall at all times be free from taxation within the State.

(j) Any stockholder, member, or other holder of any securities, evidences of indebtedness, or shares of the capital stock of the corporation who realizes a loss from the sale, redemption, or other disposition of any securities, evidences of indebtedness, or shares of the capital stock of the corporation, including any such loss realized on a partial or complete liquidation of the corporation, and who is not entitled to deduct such loss in computing any of such stockholder's, member's, or other holder's taxes to the State shall be entitled to credit against any taxes subsequently becoming due to the State from such stockholder, member, or other holder, a percentage of such loss equivalent to the highest rate of tax assessed for the year in which the loss occurs upon mercantile and business corporations. (1955, c. 1146, s. 15; 1957, c. 1041, s. 3; 1967, c. 1110, s. 11; 1973, c. 476, s. 193.)

Editor's Note. — Session Laws 1957, c. 1041, s. 5 provides that nothing contained in the 1957 amendment to this section shall be

construed to change or affect in any way the provisions of the certificate of incorporation of any existing corporation organized under this

Chapter with respect to requirements to amend its certificate of incorporation.

The reference in this section to "Article V, § 3, of the Constitution of North Carolina" is to

that section in the Constitution of 1868. Corresponding provisions in the present Constitution are found in Art. V, § 2, subsections (1), (2) and (6).

§ 53A-16. Duration of corporation.

The period of duration of the corporation shall be 50 years. (1955, c. 1146, s. 16.)

§ 53A-17. Charter void unless business begun; Chapter void unless corporation organized.

If a corporation organized pursuant to this Chapter shall fail to begin business within three years from the effective date of its charter then said charter shall become null and void. If, within three years from May 20, 1955, no corporation is organized pursuant to this Chapter, then and in that event, this Chapter shall become null and void. (1955, c. 1146, s. 17.)

§ 53A-18. Credit of State not pledged.

Under no circumstances is the credit of the State pledged herein. (1955, c. 1146, s. 18.)

Chapter 54. Cooperative Organizations.

SUBCHAPTER I. BUILDING AND LOAN ASSOCIATIONS, BUILD- ING ASSOCIATIONS AND SAVINGS AND LOAN ASSOCIATIONS.

Article 1.

Organization.

Sec.

54-1 to 54-12.1. [Repealed.]

Article 2.

Shares and Shareholders.

54-13 to 54-18.2. [Repealed.]

Article 2A.

Savings Accounts.

54-18.3 to 54-18.6. [Repealed.]

Article 3.

Loans.

54-19 to 54-23. [Repealed.]

Article 4.

Under Control of Administrator of the Savings and Loan Division.

54-24 to 54-33.3. [Repealed.]

Article 5.

Foreign Associations.

54-34 to 54-41. [Repealed.]

Article 5A.

Reserves.

54-41.1. [Repealed.]

Article 6.

Withdrawals.

54-42, 54-43. [Repealed.]

Article 7.

Statements of Financial Condition of Associations.

54-44. [Repealed.]

Article 7A.

Mutual Deposit Guaranty Associations.

54-44.1 to 54-44.14. [Repealed.]

SUBCHAPTER II. LAND AND LOAN ASSOCIATIONS.

Article 8.

Organization and Powers.

Sec.

54-45. Application of term.

54-46. Incorporation and powers.

54-47. Loans.

54-48. Reserve associations.

54-49. Land Conservation and Development
Bureau; land mortgage associa-
tions.

54-50. Number of incorporators; capital stock.

54-51. Incorporation.

54-52. Organization.

54-53. Corporate powers.

54-54. Restrictions.

54-55. Mortgage forms; approval.

54-56. Repayment of loan and interest.

54-57. Terms of payment.

54-58. Transfer of mortgaged lands.

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54-62. Appraisal of lands.

54-63. Preference prohibited; association
borrowing money.

54-64. Bond issues.

54-65. Deed of trust.

54-66. Collaterals deposited with State Treas-
urer.

54-67. Redemption of bonds.

54-68. Validity of bonds after maturity.

54-69. Bonds as payment.

54-70. Bonds as investments.

54-71. Application of earnings; reserve fund.

54-72. Restriction on holding real estate.

54-73. Banking laws applicable.

SUBCHAPTER III. CREDIT UNIONS.

Article 9.

Credit Union Division; Admin- istrator of Credit Unions.

54-74 to 54-75.1. [Repealed.]

Article 10.

Incorporation of Credit Unions.

54-76 to 54-81. [Repealed.]

Article 11.

Powers of Credit Unions.

54-82 to 54-93. [Repealed.]

Article 12.

Shares in the Corporation.

Sec.

54-94 to 54-97. [Repealed.]

Article 13.

Members and Officers.

54-98 to 54-104. [Repealed.]

Article 14.

Supervision and Control.

54-105 to 54-109. [Repealed.]

Article 14A.

Formation of Credit Union.

- 54-109.1. Definition and purposes.
- 54-109.2. Organization procedure.
- 54-109.3. Form of articles and bylaws.
- 54-109.4. Amendments.
- 54-109.5. Use of name exclusive.
- 54-109.6. Office facilities.
- 54-109.7 to 54-109.9. [Reserved.]

Article 14B.

Supervision and Regulation.

- 54-109.10. Creation and supervision of Division.
- 54-109.11. Duties of Administrator.
- 54-109.12. Corporations organized hereunder subject to Administrator of Credit Unions; rules and regulations.
- 54-109.13. Revocation of certificate; liquidation.
- 54-109.14. Fees.
- 54-109.15. Reports.
- 54-109.16. Annual examinations required; payment of cost.
- 54-109.17. Records.
- 54-109.18. Selection of attorneys to handle loan-closing proceedings.
- 54-109.19. Removal of officers.
- 54-109.20. [Reserved.]

Article 14C.

Powers of Credit Union.

- 54-109.21. General powers.
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- 54-109.23 to 54-109.25. [Reserved.]

Article 14D.

Membership.

- 54-109.26. "Membership" defined.
- 54-109.27. Societies and other associations.
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- 54-109.29. Members who leave field.
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- 54-109.32 to 54-109.34. [Reserved.]

Article 14E.

Direction of Affairs.

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- 54-109.35. Election or appointment of officials.
- 54-109.36. Record of board and committee members.
- 54-109.37. Vacancies.
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- 54-109.41. Authority of directors.
- 54-109.42. Executive committee.
- 54-109.43. Meetings of directors.
- 54-109.44. Duties of directors.
- 54-109.45. Authority of credit committee.
- 54-109.46. Meetings of credit committee.
- 54-109.47. Loan officers.
- 54-109.48. When credit committee dispensed with.
- 54-109.49. Duties of supervisory committee.
- 54-109.50 to 54-109.52. [Reserved.]

Article 14F.

Savings Accounts.

- 54-109.53. Shares.
- 54-109.54. Dividends.
- 54-109.55. Deposits.
- 54-109.56. Thrift accounts.
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- 54-109.59. Liens.
- 54-109.60. [Repealed.]
- 54-109.61. Reduction in shares.
- 54-109.62 to 54-109.64. [Reserved.]

Article 14G.

Loans.

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- 54-109.66. Application.
- 54-109.67. Loan limit.
- 54-109.68. Security.
- 54-109.69. Installments.
- 54-109.70. Line of credit.
- 54-109.71. Other loan programs.
- 54-109.72 to 54-109.74. [Reserved.]

Article 14H.

Insurance and Group Purchasing.

- 54-109.75. Insurance for members.
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- 54-109.77. Group purchasing.
- 54-109.78. Share and deposit insurance.
- 54-109.79 to 54-109.81. [Reserved.]

Article 14-I.

Investments.

- 54-109.82. Investment of funds.
- 54-109.83 to 54-109.85. [Reserved.]

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Article 14J.

Reserve Allocations.

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54-109.86. Transfers to regular reserve.
54-109.87. Use of regular reserve.
54-109.88. "Risk assets" defined.
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Article 14K.

Change in Corporate Status.

- 54-109.92. Suspension.
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Article 14L.

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54-109.100 to 54-109.104. [Reserved.]

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Confidential Information.

- 54-109.105. What information deemed confidential; disclosure; certain information deemed public; exchange of information.

Article 15.

Central Associations.

- 54-110. Central association.

SUBCHAPTER IV. COOPERATIVE ASSOCIATIONS.

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Organization of Associations.

- 54-111. Nature of the association.
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54-112. Use of term restricted.
54-113. Articles of agreement.
54-114. Certificate of incorporation.
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54-116. Bylaws adopted.
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Article 17.

Stockholders and Officers.

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54-121. Shares issued on purchase of business.
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Powers and Duties.

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Article 19.

Purpose and Organization.

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54-131. Who may organize.
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54-139. Domestication of foreign cooperative corporations; limitation on use of word "cooperative".
54-140. Association heretofore organized may adopt the provisions of this Subchapter.
54-141. Associations not in restraint of trade.
54-142. Application of Business Corporation Act to cooperative associations with capital stock.
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Article 20.

Members and Officers.

- 54-145. Members.
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Article 21.

Powers, Duties, and Liabilities.

- 54-151. Powers.
54-152. Marketing contract.
54-153. Purchasing business of other associations, persons, firms, or corporations; payment; stock issued.

Sec.

54-154. Annual reports.

54-155. Interest in other corporations or associations.

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54-160. Procedure for consolidation.

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Article 22.

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54-159. Procedure for merger.

SUBCHAPTER I. BUILDING AND LOAN ASSOCIATIONS, BUILDING ASSOCIATIONS AND SAVINGS AND LOAN ASSOCIATIONS.

ARTICLE 1.

Organization.

§§ 54-1 to 54-12.1: Repealed by Session Laws 1981, c. 282, s. 1, effective May 1, 1981.

Cross References. — For present provisions as to savings and loan associations, see Chapter 54B.

ARTICLE 2.

Shares and Shareholders.

§§ 54-13 to 54-18.2: Repealed by Session Laws 1981, c. 282, s. 1, effective May 1, 1981.

Cross References. — For present provisions as to savings and loan associations, see Chapter 54B.

ARTICLE 2A.

Savings Accounts.

§§ 54-18.3 to 54-18.6: Repealed by Session Laws 1981, c. 282, s. 1, effective May 1, 1981.

Cross References. — For present provisions as to savings and loan associations, see Chapter 54B.

ARTICLE 3.

Loans.

§§ 54-19 to 54-23: Repealed by Session Laws 1981, c. 282, s. 1, effective May 1, 1981.

Cross References. — For present provisions as to savings and loans associations, see Chapter 54B.

ARTICLE 4.

Under Control of Administrator of the Savings and Loan Division.

§§ 54-24 to 54-33.3: Repealed by Session Laws 1981, c. 282, s. 1, effective May 1, 1981.

Cross References. — For present provisions as to savings and loan associations, see Chapter 54B.

ARTICLE 5.

Foreign Associations.

§§ 54-34 to 54-41: Repealed by Session Laws 1981, c. 282, s. 1, effective May 1, 1981.

Cross References. — For present provisions as to savings and loan associations, see Chapter 54B.

ARTICLE 5A.

Reserves.

§ 54-41.1: Repealed by Session Laws 1981, c. 282, s. 1, effective May 1, 1981.

Cross References. — For present provisions as to savings and loan associations, see Chapter 54B.

ARTICLE 6.

Withdrawals.

§§ 54-42, 54-43: Repealed by Session Laws 1981, c. 282, s. 1, effective May 1, 1981.

Cross References. — For present provisions as to savings and loan associations, see Chapter 54B.

ARTICLE 7.

Statements of Financial Condition of Associations.

§ 54-44: Repealed by Session Laws 1981, c. 282, s. 1, effective May 1, 1981.

Cross References. — For present provisions as to savings and loan associations, see Chapter 54B.

ARTICLE 7A.

Mutual Deposit Guaranty Associations.

§§ 54-44.1 to 54-44.14: Repealed by Session Laws 1981, c. 282, s. 1, effective May 1, 1981.

Cross References. — For present provisions as to savings and loan associations, see Chapter 54B.

SUBCHAPTER II. LAND AND LOAN ASSOCIATIONS.

ARTICLE 8.

Organization and Powers.

§ 54-45. Application of term.

The term "land and loan associations" shall apply to and include all corporations, companies, societies or associations organized for the purpose of making loans to their members only, and of enabling their members to acquire real estate, make improvements thereon, and remove encumbrances therefrom by the payment of money in periodical installments or principal sums, and for the accumulation of a fund to be returned to members who do not obtain advances for such purposes, where the principles of building and loan associations and their work are adapted to the use of the farmers and the rural population.

It shall be unlawful for any corporation, company, society, or association doing business in this State not so conducted to use in its corporate name the term "land and loan association," or in any manner or device to hold itself out to the public as a land and loan association. (1915, c. 172, s. 1; C.S., s. 5204.)

§ 54-46. Incorporation and powers.

Land and loan associations shall be incorporated, supervised, and be subject to such regulations and have such privileges as are prescribed for building and loan associations under the laws of this State as they now are or may be hereafter enacted, except as prescribed in this Article. (1915, c. 172, s. 2; C.S., s. 5205.)

§ 54-47. Loans.

The board of directors of land and loan associations may contract for loans to the amount of seventy-five percent (75%) of the securities used by them as collateral, where the loans are on long time (three or more years), and for at least one percent (1%) less than is charged by such associations on their loans to shareholders; and they may make short loans to their shareholders on their shares and personal endorsement or personal property. (1915, c. 172, s. 3; C.S., s. 5206.)

Cross References. — As to loans on mortgages, etc., issued under the National Housing Act, 12 U.S.C. § 1701 et seq., see § 53-45.

§ 54-48. Reserve associations.

Associations to be known as "reserve land and loan associations" may be chartered and licensed as provided in this Article, when they are organized and the stock therein is held by local land and loan associations, and shall have such powers, rights, and privileges as are accorded to other domestic associations, and they may conform to such laws, rules, and regulations as may be prescribed by the laws of the United States, or of this State, to enable them to receive moneys, bonds, or securities to be used in loans and to secure the same. Such reserve associations shall be under the supervision of the Administrator of the Savings and Loan Division as are building and loan associations. (1915, c. 172, s. 4; C.S., s. 5207; 1971, c. 864, s. 17.)

§ 54-49. Land Conservation and Development Bureau; land mortgage associations.

Recognizing that agriculture is the most fundamental wealth-producing occupation of the State and that land is the basis of agriculture, the General Assembly of North Carolina does hereby authorize and direct the State Department of Agriculture to establish as a major division of its organization a Land Conservation and Land Development Bureau. The function of this Bureau shall be to promote conservation, rural home ownership, and the development of the land resources of the State through land mortgage associations under the following provisions. (1925, c. 223, s. 1.)

§ 54-50. Number of incorporators; capital stock.

Any number of persons, resident freeholders of the State, not less than 15, may associate to establish an association on the terms and conditions and subject to the liabilities hereinafter prescribed. The aggregate amount of the capital stock of any such association shall not be less than twenty thousand dollars (\$20,000). Such association shall mean a corporation organized under the laws of the State for the purpose of making loans upon agricultural lands, forest lands and dwelling houses within this State and known as a land mortgage association. (1925, c. 223, s. 2.)

§ 54-51. Incorporation.

The articles of incorporation shall be in writing, signed and acknowledged by the incorporators and shall contain the following:

- (1) The declaration that they are associating for the purpose of forming a land mortgage association under the provisions of this Article.
- (2) The name of such association, which shall be in no material respect similar to any other association in the same county.
- (3) The name of the village, town or city, and the county where such association is to be located.
- (4) The amount of capital stock, which shall be divided into shares of one hundred dollars (\$100.00) each.
- (5) The period for which such association is organized. (1925, c. 223, s. 3.)

§ 54-52. Organization.

The incorporators at their first annual meeting shall elect by ballot from their number a board of trustees of not less than six members who shall adopt a code of bylaws and a plan of organization approved by the Commissioner of Agriculture and the Commissioner of Banks. (1925, c. 223, s. 4; 1931, c. 243, s. 5.)

§ 54-53. Corporate powers.

Said land mortgage association shall have power:

- (1) To make loans, the conditions of which shall be approved by the Commissioner of Banks if the security taken therefor is to be used as the basis for a bond issue under subdivision (3) hereof, and to accept as security for any such loan a first mortgage upon improved or partially improved agricultural lands within this State. Such loan shall not exceed, however, sixty-five percent (65%) of the value of such real estate so conveyed, according to the appraisal made as herein provided.
- (2) To purchase first mortgages, heretofore or hereafter issued against North Carolina agricultural lands, either improved or partially improved, from persons or firms resident of this State or corporations organized under the laws of this State engaged in the colonization or settlement of North Carolina lands and to whom such mortgages were issued, if, after investigation, the plan of settlement or colonization followed by such person, firm or corporation is approved by the Commissioner of Agriculture as beneficial to the settler or colonist, and if the lands against which such mortgages are issued are found by the said Commissioner to be in fact agricultural lands suitable for agricultural purposes and the terms and conditions of the loans made by such person, firm or corporation are just and reasonable, or from banks or trust companies organized under the laws of this State, or of the United States, to do business in this State, to which such mortgages were issued direct by the borrowers. Each such mortgage shall be payable on the amortization plan maturing in not less than 20 years. The request for an investigation leading to such a purchase of mortgages from persons, firms or corporations engaged in the settlement or colonization of North Carolina lands shall be accompanied by a deposit, the amount of such deposit to be determined by the Commissioner of Agriculture. Upon completion of the investigation the Commissioner of Agriculture shall render a statement of expense accompanied by a remittance of any unused balance of such deposit, but no mortgage shall be purchased until the lands against which the

same is issued have been appraised as hereinafter provided for the appraisal of land for a loan by the land mortgage association and such mortgage is approved by all members of the loan committee.

- (3) To issue bonds secured by the pledge of the mortgage so taken or purchased.
- (4) To pledge the note and mortgages so taken or purchased under the provisions of subdivisions (1) and (2) hereof as security for the bonds of the land mortgage association referred to in subdivision (3) hereof. (1925, c. 223, s. 5; 1931, c. 243, s. 5.)

Cross References. — As to investment in bonds guaranteed by the United States, see § 53-44. As to loan on mortgages, etc., issued under the National Housing Act, 12 U.S.C. § 1701 et seq., see § 53-45.

§ 54-54. Restrictions.

All mortgage obligations acquired by the company shall be subject to the following restrictions:

- (1) Each such mortgage shall be a first and valid lien upon improved or partially improved agricultural lands within the State of North Carolina;
- (2) Each such mortgage shall be a first and valid lien upon the whole and undivided fee and upon no lesser estate;
- (3) Each such mortgage shall be given to secure a principal indebtedness not exceeding in amount fifteen percent (15%) of the capital and surplus of the company;
- (4) All such mortgages shall contain provisions for soil conservation;
- (5) All such mortgages shall contain provisions for the time of commencing payments for annual or semiannual reduction of the indebtedness secured thereby, subject to the requirements as to repayment of loans and interest hereinafter provided;
- (6) The company shall make no loan secured by mortgage of any real estate in which any officer or trustee of the company is interested either directly or indirectly, except upon the approval of two thirds of all the trustees;
- (7) A sufficient amount of the proceeds of any loan made upon lands upon which are buildings in course of construction or upon which land clearing or other improvements are being made shall be retained by the association and paid out only upon construction or improvement vouchers, countersigned by a duly authorized agent of the association. (1925, c. 223, s. 6.)

§ 54-55. Mortgage forms; approval.

The mortgages to be given to the association, the bonds to be issued and the trust deed executed to secure the bonds shall be in such form and shall contain such conditions as will adequately protect all parties thereto. The trustees shall provide the forms subject to the joint approval of the Commissioner of Banks and the Attorney General. (1925, c. 223, s. 7; 1931, c. 243, s. 5.)

§ 54-56. Repayment of loan and interest.

The prospective borrower may be required to pay all expenses incidental to the examination of title and appraisal of the property. The total amount shall include (i) the rate of interest agreed upon; and (ii) a payment. (1925, c. 223, s. 8.)

§ 54-57. Terms of payment.

A borrower may repay his loan by installments of such frequency and amounts as may be agreed upon: Provided, that not less than one percent (1%) of the original amount of the mortgage shall be paid upon the principal thereof annually, and commencing not later than the sixth year succeeding the year in which the loan was made the borrower may pay a larger installment upon the principal, or the whole of it, at any interest date, such payments to be in amounts equal to additions of one or more principal amortization payments. Such payment may be made in cash, or by tendering at par bonds of the association. For failure to pay the interest or any installment required by the terms of the loan, the borrower may be fined as the bylaws may prescribe. But the borrower shall never be required to pay more than the specified installment, nor to pay the principal before it is due except as prescribed herein for partial repayment on account of depreciation and for foreclosure by the association. The borrower may on 60 days' notice repay the association his total indebtedness, or, without such notice, upon payment of 60 days' interest upon the principal unpaid. The borrower shall be entitled to a receipt for all installments as paid, and where the repayment is complete to a satisfaction of his note and mortgage. (1925, c. 223, s. 9.)

Cross References. — As to satisfaction of mortgages, see § 45-37 et seq.

§ 54-58. Transfer of mortgaged lands.

The acquirer of any lands mortgaged to a land mortgage association shall enter at once, on the acquisition of the land, into a written agreement with the association, attested by a notary, or a justice, and assume the personal responsibility for the indebtedness to the association attaching to such lands. This document must be presented to the trustees within 14 days after demand. (1925, c. 223, s. 10.)

§ 54-59. Calling in loans before due.

Every land mortgage association shall have the power to call in loans upon 60 days' notice:

- (1) When the person acquiring the lands upon which money has been loaned does not comply with the provisions of G.S. 54-58 and fulfill the obligations incumbent upon him;
- (2) When the debtor does not meet the obligation imposed upon him by his contract and the bylaws of the land mortgage association;
- (3) When the mortgaged premises become subject to forced sale;
- (4) When the mortgaged premises are depreciating in value because of lack of care, of failure to maintain and conserve or from other cause.

The trustees of the association, whenever necessary, shall provide for an inspection of the mortgaged premises by the State Department of Agriculture for an investigation of the care which is being given said premises, and may employ an expert to inspect the soil with a view of determining whether or not the same is being depleted. (1925, c. 223, s. 11.)

§ 54-60. Partial recall of debt.

The association may require a suitable partial repayment of the debt if the mortgaged premises may have at any time become depreciated in value from any cause whatsoever. (1925, c. 223, s. 12.)

§ 54-61. Foreclosure.

Whenever any loan is called in and the borrower shall fail to pay the principal and interest due to the association as required by law and the notices given him, the land mortgage association may then foreclose upon the mortgaged premises as for a past-due loan. But in no case shall a borrower be liable for a sum greater than the amount of the unpaid portion of the loan with any accretions of interest thereon and expenses incidental to the collection thereof. (1925, c. 223, s. 13.)

§ 54-62. Appraisal of lands.

Upon application for a loan the land mortgage association shall cause the lands which it is proposed to mortgage to the association to be appraised by a competent appraiser furnished it by the State Department of Agriculture. (1925, c. 223, s. 14.)

§ 54-63. Preference prohibited; association borrowing money.

No land mortgage association, and no officer or agent thereof, shall give any preference to any creditor by pledging any of the assets of such association as collateral security, except that any such association may borrow money for temporary purposes, and may pledge assets of the association as collateral security therefor. Whenever it shall appear that any land mortgage association has borrowed habitually for the purpose of reloading, the Commissioner of Banks may require such association to pay off such amount so borrowed. (1925, c. 223, s. 15; 1931, c. 243, s. 5.)

§ 54-64. Bond issues.

(a) The bonds to be issued by any land mortgage association may be issued for such amounts, bearing such serial number, and date or dates, and be payable at such time and times, bear such rate of interest, and be redeemable at maturity or upon notice at such times and in such manner, as the land mortgage association may, subject to the approval of the Banking Commission, deem advisable.

(b) Each land mortgage association shall keep a register for the registration and transfer of bonds issued by it in which it shall register, or cause to be registered, all bonds upon presentation thereof for such purpose; and such register shall contain the post-office address of all registered holders of bonds and shall, at all reasonable times, be open to the inspection of the Banking Commission, or any of its deputies, and to the State Treasurer. (1925, c. 223, s. 16.)

§ 54-65. Deed of trust.

(a) To secure the payment of such bonds, the land mortgage association shall issue a collateral deed of trust to the State Treasurer, pledging as security for such bonds the notes and mortgages taken or purchased, as provided herein, in an amount equal to or exceeding the aggregate amount of bonds issued or to be issued.

(b) The total amount of bonds actually outstanding shall not at any time exceed the total amount unpaid upon the notes secured by the mortgages belonging to the association and pledged for the payment of the bonds, plus such securities and moneys as may be on deposit with the State Treasurer under the provisions hereof.

(c) The aggregate amount of the principal of all bonds issued by land mortgage associations and outstanding at any one time shall not exceed 20 times the amount of the capital and surplus of the company. (1925, c. 223, s. 17.)

§ 54-66. Collaterals deposited with State Treasurer.

All mortgages pledged to secure the payment of the bonds issued hereunder shall be deposited and left with the State Treasurer. The land mortgage association may, with the approval of the State Treasurer, remove such mortgages from the custody of the State Treasurer, substituting in place thereof other of its mortgages, or money or State of North Carolina bonds or certificates of deposit, endorsed in blank, issued by State or national banks located in North Carolina, farm mortgage bonds issued under the provisions of the Federal Farm Loan Act approved July 17, 1916, or obligations of the United States government, in an amount equal to or greater than the amount unpaid upon the notes secured by the mortgages withdrawn. (1925, c. 223, s. 18.)

§ 54-67. Redemption of bonds.

(a) Notice of redemption of bonds may on no account be given on the part of the holder thereof, but may be given by the association only for the purpose of affecting redemption in accordance with the conditions of the bonds and as provided by law and the bylaws.

(b) If the land mortgage association shall elect to redeem any bond prior to maturity, six months' notice of redemption shall be given and shall be effected by personal service upon the owner and holder of the bond, by notice mailed to his address as registered or by advertising the same three times in a newspaper selected by the State Treasurer.

(c) The numbers of the bonds of which notice of redemption is to be given shall be determined by lot, to be drawn by the president or the vice-president at a meeting of the trustees. (1925, c. 223, s. 19.)

Editor's Note. — It would seem that the word "affecting" in subsection (a) should read "effecting," however it appears as "affecting" in the act from which this section was codified.

§ 54-68. Validity of bonds after maturity.

In case the holder of any bond outstanding shall not have presented the same for payment within the period of two years after its maturity or within two years after the date fixed for the redemption, as the case may be, then such bonds shall cease to be a lien upon the mortgages, moneys, and securities pledged to the State Treasurer and deposited with him as security therefor, but such bond shall still constitute, until the statute of limitation running against such bonds shall have expired, a single legal money claim or demand against the land mortgage association issuing the same, and be recoverable from it in a suit at law, and in no event shall any interest be collectible upon such bond after the maturity thereof or after the date fixed for its redemption. (1925, c. 223, s. 20.)

§ 54-69. Bonds as payment.

If the association gives notice to a debtor for repayment of the mortgage loan the latter must pay to the association in cash or in its bonds at par the face of the same so far as it has not yet been covered by his assets in the amortization and payments. (1925, c. 223, s. 21.)

§ 54-70. Bonds as investments.

The bonds of a land mortgage association shall be a legal investment for savings associations, trust companies, or other financial institutions chartered under the laws of this State and shall also be a legal investment for trustees, executors, administrators, or custodians of public or private funds, or corporations, partnerships or associations. (1925, c. 223, s. 22.)

§ 54-71. Application of earnings; reserve fund.

The gross earnings of the association shall be ascertained annually, and there shall first be deducted therefrom the expenses incurred by the association for the preceding year and the balance thereof shall be set aside as a reserve fund for the payment of contingent losses, to an amount equal to two percent (2%) of the capital stock outstanding, and until such reserve fund equals twenty percent (20%) of the capital stock of such association. (1925, c. 223, s. 23.)

§ 54-72. Restriction on holding real estate.

No land mortgage association shall acquire real estate (other than for the occupation of its offices) except to protect its interest in case any of the mortgages owned by it are foreclosed and the property therein described sold to pay the indebtedness secured thereby. All real estate so acquired shall be promptly sold. (1925, c. 223, s. 24.)

§ 54-73. Banking laws applicable.

The statutes relating to banks and banking in this State, that is, G.S. 53-1 to 53-158 [G.S. 53-1 to 53-208], insofar as applicable and not in conflict with the provisions hereof shall apply to land mortgage associations. (1925, c. 223, s. 25.)

SUBCHAPTER III. CREDIT UNIONS.**ARTICLE 9.*****Credit Union Division; Administrator of Credit Unions.***

§§ 54-74 to 54-75.1: Repealed by Session Laws 1975, c. 538, s. 1.

Cross References. — For present provisions as to supervision and regulation of credit unions, see §§ 54-109.10 to 54-109.17.

Editor's Note. — Session Laws 1975, c. 538, s. 1, effective July 1, 1975, repealed Articles 9

through 14 of this Chapter and enacted in their place new Articles designated 9 through 14A in the act. The new Articles have been codified herein as Articles 14A through 14L.

ARTICLE 10.

Incorporation of Credit Unions.

§§ 54-76 to 54-81: Repealed by Session Laws 1975, c. 538, s. 1.

Cross References. — For present provisions as to formation of credit unions, see §§ 54-109.1 to 54-109.6.

Editor's Note. — Session Laws 1975, c. 538, s. 1, effective July 1, 1975, repealed Articles 9

through 14 of this Chapter and enacted in their place new Articles designated 9 through 14A in the act. The new Articles have been codified herein as Articles 14A through 14L.

ARTICLE 11.

Powers of Credit Unions.

§§ 54-82 to 54-93: Repealed by Session Laws 1975, c. 538, s. 1.

Cross References. — For present provisions as to supervision and regulation of credit unions, see §§ 54-109.10 to 54-109.17.

Editor's Note. — Session Laws 1975, c. 538, s. 1, effective July 1, 1975, repealed Articles 9

through 14 of this Chapter and enacted in their place new Articles designated 9 through 14A in the act. The new Articles have been codified herein as Articles 14A through 14L.

ARTICLE 12.

Shares in the Corporation.

§§ 54-94 to 54-97: Repealed by Session Laws 1975, c. 538, s. 1.

Cross References. — For present provisions as to direction of the affairs of credit unions, see §§ 54-109.35 to 54-109.49.

Editor's Note. — Session Laws 1975, c. 538, s. 1, effective July 1, 1975, repealed Articles 9

through 14 of this Chapter and enacted in their place new Articles designated 9 through 14A in the act. The new Articles have been codified herein as Articles 14A through 14L.

ARTICLE 13.

Members and Officers.

§§ 54-98 to 54-104: Repealed by Session Laws 1975, c. 538, s. 1.

Cross References. — For present provisions as to shares and accounts in credit unions, see §§ 54-109.53 to 54-109.61.

Editor's Note. Session Laws 1975, c. 538, s. 1, effective July 1, 1975, repealed Articles 9

through 14 of this Chapter and enacted in their place new Articles designated 9 through 14A in the act. The new Articles have been codified herein as Articles 14A through 14L.

ARTICLE 14.

Supervision and Control.

§§ 54-105 to 54-109: Repealed by Session Laws 1975, c. 538, s. 1.

Cross References. — For present provisions as to powers of credit unions, see §§ 54-109.21 to 54-109.31.

Editor's Note. — Session Laws 1975, c. 538, s. 1, effective July 1, 1975, repealed Articles 9

through 14 of this Chapter and enacted in their place new Articles designated 9 through 14A in the act. The new Articles have been codified herein as Articles 14A through 14L.

ARTICLE 14A.

*Formation of Credit Union.***§ 54-109.1. Definition and purposes.**

A credit union is a cooperative, nonprofit association, incorporated under Articles 14A to 14L of this Chapter, for the purposes of encouraging thrift among its members, creating a source of credit at a fair and reasonable rate of interest, and providing an opportunity for its members to use and control their own money in order to improve their economic and social condition. (1975, c. 538, s. 1.)

Editor's Note. — Session Laws 1975, c. 538, s. 1, effective July 1, 1975, repealed Articles 9 through 14 of this Chapter and enacted in their place new Articles designated Articles 9 through 14A in the act, but which have been

codified herein as Articles 14A through 14L. Where appropriate, the historical citations to the repealed sections have been added to corresponding sections in the new Articles.

§ 54-109.2. Organization procedure.

(a) Any 12 or more residents of this State, of legal age, who have a common bond referred to in G.S. 54-109.26 may make application to organize a credit union and become charter members thereof by complying with this section.

(b) The subscribers shall execute in duplicate articles of incorporation and agree to the terms thereof, which articles shall state:

- (1) The name, which shall include the words "credit union" and which shall not be the same as that of any other existing credit union in this State, and the location where the proposed credit union is to have its principal place of business;
- (2) That the existence of the credit union shall be perpetual;
- (3) The par value of the shares of the credit union, which shall be in five dollar (\$5.00) multiples, of not less than five dollars (\$5.00), nor more than twenty-five dollars (\$25.00);
- (4) The names and addresses of the subscribers to the articles of incorporation, and the value of shares subscribed to by each, which shall be not less than five dollars (\$5.00); and
- (5) That the credit union may exercise such incidental powers as are necessary or requisite to enable it to carry on effectively the business for which it is incorporated, and those powers which are inherent in the credit union as a legal entity.

(c) The subscribers shall prepare and adopt bylaws for the general government of the credit union, consistent with Articles 14A to 14L of this Chapter, and execute the same in duplicate.

(d) They shall select at least five qualified persons who agree to serve on the board of directors, and at least three qualified persons who agree to serve on the supervisory committee. A signed agreement to serve in these capacities until the first annual meeting or until the election of their successors, whichever is later, shall be executed by those who so agree. This agreement shall be submitted to the administrator of credit unions.

(e) The subscribers shall forward the required charter fee and an investigation fee, as prescribed by the Credit Union Commission, and the articles of incorporation and the bylaws to the Administrator of the Credit Union Division. The Administrator may issue a certificate of approval if the articles and the bylaws are in conformity with Articles 14A to 14L of this Chapter and he is satisfied that the proposed field of operation is favorable to the success of such credit union and that the standing of the proposed organizers is such as to give assurance that its affairs will be properly administered. He shall issue to the corporation a certificate of approval, annexed to a duplicate certificate of incorporation and of the bylaws, which certificate of approval, together with the attached duplicate certificate of incorporation, shall be recorded in the office of the register of deeds of the county in which the office of such credit union is situated, and upon recordation of the incorporators shall become and be a corporation for the purposes set forth in this Article. The register of deeds of the county in which such recordation is made shall charge the same fee for such recordation as he is now allowed to charge for handling and recording a certificate of incorporation of a corporation organized under the business corporation laws of this State. The application shall be acted upon within 30 days. (1915, c. 115, ss. 2, 9; C.S., ss. 5210, 5211, 5233; 1925, c. 73, s. 3; 1935, c. 87; 1965, c. 956, ss. 1, 4, 19; 1973, c. 199, s. 8; 1975, c. 538, s. 1.)

§ 54-109.3. Form of articles and bylaws.

In order to simplify the organization of credit unions, the Administrator of Credit Unions shall cause to be prepared a form of articles of incorporation and a form of bylaws, consistent with Articles 14A to 14L of this Chapter, which may be used by credit union incorporators for their guidance. Such articles of incorporation and bylaws shall provide:

- (1) The name of corporation.
- (2) The purposes for which it is formed.
- (3) Qualifications for membership.
- (4) The date of the annual meeting; the manner in which members shall be notified of meetings; the manner of conducting the meetings; the number of members which constitute a quorum at the meetings, and the regulations as to voting.
- (5) The number of members of the board of directors, their powers and duties, and the compensation and duties of officers elected by the board of directors, and frequency of meetings.
- (6) The number of members of the credit committee, if any, their powers and duties.
- (7) The number of members of the supervisory committee, if any, their powers and duties.
- (8) The par value of shares of capital stock.
- (9) The conditions upon which shares may be issued, paid in, transferred, and withdrawn.
- (10) The fines, if any, which shall be charged for failure to meet obligations to the corporation punctually.
- (11) The conditions upon which deposits may be received and withdrawn. Whether the proposed corporation shall, in addition, have power to borrow funds.

- (12) The manner in which the funds of the corporation shall be invested.
- (13) The conditions upon which loans may be made and repaid.
- (14) The maximum rate of interest that may be charged upon loans, not to exceed, however, the legal rate.
- (15) The method of receipting for money paid on account of shares, deposits, or loans.
- (16) The manner in which the reserve fund shall be accumulated.
- (17) The manner in which dividends shall be determined and paid to members.
- (18) The manner in which a voluntary dissolution of the corporation shall be effected.
- (19) The manner in which the bylaws and articles of incorporation may be amended. (1915, c. 115, s. 2; C.S., s. 5211; 1975, c. 538, s. 1.)

§ 54-109.4. Amendments.

(a) The articles of incorporation or the bylaws may be amended as provided in the bylaws. Amendments to the articles of incorporation or bylaws shall be submitted to the Administrator of Credit Unions who shall approve or disapprove the amendments within 60 days.

(b) Amendments shall become effective upon approval in writing by the Administrator and no fee shall be charged for such approval. (1915, c. 115, s. 3; C.S., s. 5213; 1925, c. 73, s. 3; 1935, c. 87; 1965, c. 956, s. 6; 1973, c. 1331, s. 3; 1975, c. 538, s. 1.)

§ 54-109.5. Use of name exclusive.

With the exception of a credit union organized under the provisions of Articles 14A to 14L of this Chapter or of any other credit union act, or an association of credit unions or a recognized chapter thereof, any person, corporation, copartnership or association using a name or title containing the words "credit union" or any derivation thereof or representing themselves in their advertising or otherwise as conducting business as a credit union shall be guilty of a misdemeanor punishable by fine of not more than five hundred dollars (\$500.00) or imprisoned not more than one year, or both, and may be permanently enjoined from using such words in its name. (1915, c. 115, s. 4; C.S., s. 5214; 1925, c. 73, s. 3; 1935, c. 87; 1941, c. 236; 1975, c. 538, s. 1.)

§ 54-109.6. Office facilities.

(a) A credit union may maintain service facilities at locations other than its main office if the maintenance of such offices is reasonably necessary to furnish service to its members, subject to the approval of the Administrator of Credit Unions.

(b) A credit union may change its place of business within this State upon written notice to the Credit Union Division. Such a change shall be recorded in the office of the register of deeds where its office was located, and a second duplicate in the office of the register of deeds of the county in which the new office is to be located, if same is changed to another county. If the change is from one location to another in the same county, then only the Administrator of Credit Unions need be notified.

(c) A credit union may share office space with one or more credit unions and contract with any person or corporation to provide facilities or personnel. (1915, c. 115, ss. 9, 25; C.S., ss. 5215, 5233; 1925, c. 73, s. 3; 1935, c. 87; 1965, c. 956, ss. 1, 7, 19; 1967, c. 823, s. 10; 1973, c. 199, s. 8; c. 1331, s. 3; 1975, c. 538, s. 1.)

§§ 54-109.7 to 54-109.9: Reserved for future codification purposes.

ARTICLE 14B.

Supervision and Regulation.

§ 54-109.10. Creation and supervision of Division.

There shall be established in the North Carolina Department of Commerce a Credit Union Division which shall be under the supervision of [the] Administrator of Credit Unions appointed by the Secretary of Commerce. The Credit Union Division and the Administrator of Credit Unions shall be under the general direction and supervision of the Secretary of Commerce, and there shall be such assistants to the Administrator of Credit Unions as may be necessary and the salaries of the Administrator and assistants shall be fixed by the State Personnel Council. (1915, c. 115, s. 1; C.S., s. 5208; 1925, c. 73, s. 4; 1935, c. 87; 1965, c. 956, s. 1; 1971, c. 864, s. 17; 1975, c. 538, s. 1.)

Editor's Note. — Session Laws 1975, c. 538, s. 1, effective July 1, 1975, repealed Articles 9 through 14 of this Chapter and enacted in their place new Articles designated Articles 9 through 14A in the act, but which have been

codified herein as Articles 14A through 14L. Where appropriate, the historical citations to the repealed sections have been added to corresponding sections in the new Articles.

CASE NOTES

Cited in North Carolina Sav. & Loan League v. North Carolina Credit Union Comm'n, 302 N.C. 458, 276 S.E.2d 404 (1981).

§ 54-109.11. Duties of Administrator.

The duties of the Administrator of Credit Unions shall be as follows:

- (1) To organize and conduct in the State Department of Commerce, a bureau of information in regard to cooperative associations and rural and industrial credits.
- (2) Upon request, to furnish, without cost, such printed information and blank forms as, in his discretion, may be necessary for the formation and establishment of any local credit union in the State.
- (3) To maintain an educational campaign in the State looking to the promotion and organization of credit unions. Upon the written request of 12 bona fide residents of any particular locality in this State expressing a desire to form a local credit union at or in such locality, the Administrator of Credit Unions, or one of his assistants, shall proceed as promptly as may be convenient to such locality and make an investigation in order that the Administrator may determine whether or not a local credit union should be established according to the standards set forth and provided in this Article. The Administrator shall notify the applicants of his decision within 30 days after receipt of the written request. Before refusing the establishment of a credit union, the Administrator shall afford the applicants an opportunity to be heard therewith in person or by counsel and at least 60 days prior to the date set for a hearing on any such matter shall notify in writing the applicants of the date of said hearing and assign therein the grounds for the action contemplated to be taken and as to which

inquiry shall be made on the date of such hearing. The determination of the Administrator shall be subject to judicial review in all respects according to the provisions and procedures set forth in Chapter 150A of the General Statutes of North Carolina, as amended.

- (4) To examine at least once a year, and oftener if such examination be deemed necessary by the Administrator or his assistant, the credit unions formed under this Article. A report of such examination shall be filed with the State Department of Commerce, and a copy mailed to the credit union at its proper address.
- (5) The Administrator of Credit Unions is authorized, empowered, and directed to fix the amount of a blanket surety bond which shall be required of each credit union official, committee member and employee, irrespective of whether such official, committee member and employee receives, pays or has custody of money or other personal property owned by a credit union or in the custody or control of the credit union as collateral or otherwise. The surety on the bond shall be a surety company authorized to do business in North Carolina. Any such bond or bonds shall be in a form approved by the Administrator of Credit Unions with a view to providing surety coverage to the credit union with reference to loss by reason of acts of fraud or dishonesty including forgery, theft, embezzlement, wrongful abstraction or misapplication on the part of the person, directly or through connivance with others, and such other surety coverages as the Administrator of Credit Unions may determine to be reasonably appropriate or as elsewhere required by the Chapter. Any such bond or bonds shall be in an amount in relation to the money or other personal property involved or in relation to the assets of the credit union as the Administrator may from time to time prescribe by regulation for the purpose of requiring reasonable coverage. The Administrator may also approve the use of a form of excess coverage bond whereby a credit union may obtain an amount of coverage in excess of the basic surety coverage. No agreement, compromise or settlement of any claim or claims filed by a credit union with any surety or any surety company for less than the full amount of said claim or claims shall be entered into or made by the board of directors of any credit union unless and until the said claim or claims shall have been submitted to the Administrator of Credit Unions and his advice thereon given or transmitted to the board of directors of said credit union. The following schedule shall be deemed as the minimum fidelity and faithful performance bond requirements only:

<i>Assets</i>		<i>Minimum Coverage</i>
\$ 0,000 to	\$ 5,000	\$ 1,000
5,001 to	10,000	2,000
10,001 to	20,000	4,000
20,001 to	30,000	6,000
30,001 to	40,000	8,000
40,001 to	50,000	10,000
50,001 to	75,000	15,000
75,001 to	100,000	20,000
100,001 to	200,000	30,000
200,001 to	300,000	40,000
300,001 to	400,000	50,000
400,001 to	500,000	70,000
500,001 to	750,000	85,000
750,001 to	1,000,000	100,000

Assets	Minimum Coverage
\$1,000,001 to 50,000,000	100,000 plus \$50,000 for each million or fraction thereof of assets over \$1,000,000
50,000,001 to 150,000,000	2,500,000 plus \$25,000 for each million or fraction thereof of assets over \$50,000,000
Over \$150,000,000	5,000,000

It shall be the duty of the board of directors of each credit union to provide proper protection to meet any circumstances by obtaining adequate bond (an insurance) coverage in excess of the above minimum schedule. The treasurer and all other persons handling credit union funds or records before entering upon his or their duties shall give a proper bond with good and sufficient surety, in an amount and character to be determined by the board in compliance with regulations conditioned upon the faithful performance of his or their trust.

The Administrator may require additional coverage for any credit union when, in his opinion, the surety bonds in force are insufficient to provide adequate surety coverage, and it shall be the duty of the board of directors of any credit union to obtain such additional coverage within 60 days after the date of written notice by the Administrator to such board of directors. For good cause shown, the Administrator may extend the time to obtain additional coverage. (1915, c. 115, s. 1; C.S., s. 5209; 1925, c. 73, ss. 2, 3, 5, 6; 1935, c. 87; 1957, c. 989, s. 1; 1965, c. 956, ss. 1-3; 1971, c. 864, s. 17; 1973, c. 199, ss. 1-3; c. 1331, s. 3; 1975, c. 538, s. 1; 1977, c. 559, s. 1.)

§ 54-109.12. Corporations organized hereunder subject to Administrator of Credit Unions; rules and regulations.

In addition to any and all other powers, duties and functions vested in the Administrator of Credit Unions under the provisions of this Article, the Administrator of Credit Unions shall have general control, management and supervision over all corporations organized under the provisions of Article 14A. All corporations organized under the provisions of Article 14A shall be subject to the management, control and supervision of the Administrator of Credit Unions as to their conduct, organization, management, business practices and their financial and fiscal matters. The Administrator of Credit Unions may prescribe rules and regulations for the administration of this Article, as well as rules and regulations relating to financial records, business practices and the conduct and management of credit unions, and it shall be the duty of the board of directors and of the various officers of the credit union to put into effect and to carry out such regulations. (1915, c. 115, s. 7; C.S., s. 5237; 1925, c. 73, s. 3; 1935, c. 87; 1957, c. 989, s. 6; 1965, c. 956, ss. 1, 22; 1975, c. 538, s. 1; 1979, c. 198.)

§ 54-109.13. Revocation of certificate; liquidation.

If any such corporation shall neglect to make its annual report, as provided in this Article, or any other report required by the Administrator of Credit Unions for more than 15 days, or shall fail to pay the charges required, including the fines for delay in filing reports, the Administrator of Credit Unions shall give notice to such corporation of his intention to revoke the certificate of approval of the corporation for such neglect or failure, and if such neglect or

failure continues for 15 days after such notice, the said Administrator shall, at his discretion, personally or by an agent appointed by him, take possession of the property and business of the corporation and retain possession until such time as he may permit it to resume business, or until its affairs be finally liquidated as provided for in G.S. 54-109.93. (1915, c. 115, s. 7; C.S., s. 5240; 1925, c. 73, ss. 3, 8; 1935, c. 87; 1957, c. 989, s. 8; 1965, c. 956, s. 1; 1975, c. 538, s. 1.)

§ 54-109.14. Fees.

(a) Each credit union subject to supervision and examination by the Administrator of Credit Unions, including credit unions in process of voluntary liquidation, shall pay into the office of the Administrator of Credit Unions twice each year, in the months of January and July, supervision fees, except those credit unions which liquidate or convert its charter shall pay into the office of the Administrator of Credit Unions, to the date of dissolution, pro rata supervision fees. Examination fees shall be paid promptly upon receipt of the examination report and invoice.

The Administrator of Credit Unions, subject to the advice and consent of the Credit Union Commission, shall, on or before December 1 of each year, determine and fix the scale of supervisory and examination fees to be assessed during the next calendar year.

No credit union shall be required to pay any supervisory fee until the expiration of 12 months from the date of the issuance of a certificate of incorporation to such credit union.

(b) Moneys collected under this section shall be deposited with the State Treasurer of North Carolina and expended, under the terms of the Executive Budget Act, to defray expenses incurred by the office of the Administrator of Credit Unions in carrying out its supervisory and auditing functions.

(c) All revenue derived from fees will be placed into a special account to be administered solely for the operation of the Credit Union Division. (1915, c. 115, s. 7; C.S., s. 5238; 1925, c. 73, ss. 3, 7; 1935, c. 87; 1941, c. 235; 1955, c. 1135, ss. 3, 4; 1957, c. 989, s. 7; 1965, c. 956, ss. 1, 23, 24; 1969, c. 69, s. 6; 1971, c. 864, s. 17; 1973, c. 199, s. 12; 1975, c. 538, s. 1; 1977, c. 559, ss. 2, 3.)

§ 54-109.15. Reports.

(a) Credit unions organized under Articles 14A to 14L of this Chapter shall, in January and in July of each year, make a report of condition to the Administrator of Credit Unions on forms supplied by him for that purpose. Additional reports may be required.

(b) Any such corporation which neglects to make semiannual reports as provided in subsection (a) of this section, or any of the other reports required by the Administrator of Credit Unions at the time fixed by the Administrator, shall forfeit to the Administrator of Credit Unions five dollars (\$5.00) for each day such neglect continues; and, furthermore, the Administrator of Credit Unions shall have authority, in his discretion, to revoke the certificate of incorporation and take possession of the assets and business of any corporation failing to pay the fees required in this section after serving notice of at least 15 days upon such corporation of his intention so to do. (1915, c. 115, s. 7; C.S., ss. 5238, 5240; 1925, c. 73, ss. 3, 7, 8; 1935, c. 87; 1941, c. 235; 1955, c. 1135, ss. 3, 4; 1957, c. 989, ss. 7, 8; 1965, c. 956, ss. 1, 23, 24; 1969, c. 69, s. 6; 1971, c. 864, s. 17; 1973, c. 199, s. 12; 1975, c. 538, s. 1.)

§ 54-109.16. Annual examinations required; payment of cost.

The Administrator of Credit Unions shall cause every such corporation to be examined once a year and whenever he deems it necessary. The examiners appointed by him shall be given free access to all books, papers, securities, and other sources of information in respect to the corporation; and for the purpose of such examination the Administrator shall have power and authority to subpoena and examine personally, or by one of his deputies or examiners, witnesses on oath and documents, whether such witnesses are members of the corporation or not, and whether such documents are documents of the corporation or not. The Administrator may designate an independent auditing firm to do the work under his direction and supervision, with the cost to be paid by the credit union involved. (1915, c. 115, s. 7; C.S., s. 5239; 1925, c. 73, s. 3; 1935, c. 87; 1965, c. 956, ss. 1, 25; 1969, c. 69, ss. 7, 8; 1975, c. 538, s. 1; 1977, c. 559, s. 4.)

§ 54-109.17. Records.

(a) A credit union shall maintain all books, records, accounting systems and procedures in accordance with such rules as the Administrator from time to time prescribes. In prescribing such rules, the Administrator shall consider the relative size of a credit union and its reasonable capability of compliance.

(b) A credit union is not liable for destroying records after the expiration of the record retention time prescribed by the Administrator.

(c) A photostatic or photographic reproduction of any credit union records shall be admissible as evidence of transactions with the credit union. (1973, c. 98, s. 1; 1975, c. 538, s. 1.)

§ 54-109.18. Selection of attorneys to handle loan-closing proceedings.

The Administrator of Credit Unions shall establish rules and regulations relating to selection of attorneys-at-law to handle credit union loan closing proceedings. (1977, c. 559, s. 10.)

§ 54-109.19. Removal of officers.

(a) The Administrator of Credit Unions shall have the right and is hereby empowered to serve a written notice of his intention to remove from office any officer, director, committeeman or employee of any credit union doing business under Articles 14A through 15 of this Chapter who shall be found to be dishonest, incompetent, or reckless in the management of the affairs of the credit union, or who persistently violates the laws of this State or the lawful orders, instructions and regulations issued by the Administrator and/or the State Credit Union Commission.

(b) A notice of intention to remove a director, officer, committee member or employee from office shall contain a statement of the alleged facts constituting the grounds therefor and shall fix a time and place at which a hearing before the Credit Union Commission will be held thereon. Such hearing shall be fixed for a date not earlier than 30 days nor later than 60 days after the date of service of such notice unless an earlier or a later date is set by the Commission at the request of such director, officer, committee member or employee and for good cause shown. Pending this hearing, the Administrator may remove the alleged violator if he finds that it is essential to the continued well-being of the credit union or the public to do so. Unless, of course, such director, officer, committee member or employee shall appear at the hearing in person or by a

duly authorized representative, he shall be deemed to have consented to the issuance of an order of such removal. In the event of such consent, or if upon the record made at any such hearing the Credit Union Commission shall find that any of the grounds specified in such notice has been determined by the greater weight of the evidence, the Commission may issue such orders of removal from office as it may deem appropriate. Any such order shall become effective at the expiration of 30 days after service upon such credit union and the director, officer, committee member or employee concerned (except in the case of an order issued upon consent, which shall become effective at the time specified therein). Such order shall remain effective and enforceable except to such extent as it is stayed, modified, terminated or set aside by action of the Credit Union Commission or a reviewing court. (1979, c. 197, s. 1.)

§ 54-109.20: Reserved for future codification purposes.

ARTICLE 14C.

Powers of Credit Union.

§ 54-109.21. General powers.

A credit union may:

- (1) Make contracts;
- (2) Sue and be sued;
- (3) Adopt and use a common seal and alter same;
- (4) Acquire, lease, hold and dispose of property, either in whole or in part, necessary or incidental to its operations;
- (5) At the discretion of the board of directors, require the payment of an entrance fee or annual membership fee, or both, of any person admitted to membership;
- (6) Receive savings from its members in the form of shares, deposits, or special-purpose thrift accounts;
- (7) Lend its funds to its members as hereinafter provided;
- (8) Borrow from any source in accordance with policy established by the board of directors;
- (9) Discount and sell any eligible obligations, subject to rules and regulations prescribed by the Administrator;
- (10) Sell all or substantially all of its assets or purchase all or substantially all of the assets of another financial institution, subject to the approval of the Administrator of Credit Unions;
- (11) Invest surplus funds as provided in Articles 14A to 14L of this Chapter;
- (12) Make deposits in legally chartered banks, savings banks, savings and loan associations, trust companies and central-type credit union organizations;
- (13) Assess charges to members in accordance with the bylaws for failure to meet properly their obligations to the credit union;
- (14) Hold membership in other credit unions organized under Articles 14A to 14L of this Chapter or other acts, and in other associations and organizations composed of credit unions;
- (15) Declare dividends; pay interest on deposits and pay interest refunds to borrowers as provided in Articles 14A to 14L of this Chapter;
- (16) Sell travelers checks and money orders and charge a reasonable fee for such services, provided the instruments are payable at institutions other than a credit union;

- (17) Perform such tasks and missions as are requested by the federal government or this State or any agency or political subdivision thereof, when approved by the board of directors and not inconsistent with Articles 14A to 14L of this Chapter;
- (18) Act as fiscal agent for and receive deposits from the federal government, this State, or any agency or political subdivision thereof;
- (19) Contribute to, support, or participate in any nonprofit service facility whose services will benefit the credit union or its membership subject to such regulations as are prescribed by the Administrator;
- (20) Make donations or contributions to any civic, charitable or community organization as authorized by the board of directors, subject to such regulations as are prescribed by the Administrator;
- (21) Act as a custodian of qualified pension funds if permitted by federal law;
- (22) Purchase or make available insurance for its directors, officers, agents, employees, and members; and
- (23) Facilitate its members' purchase of goods and services in a manner which promotes the purposes of the credit union.
- (24) The board of directors may expel from the corporation any member who has not carried out his engagement with the corporation, or has been convicted of a criminal offense, or neglects or refuses to comply with the provisions of this Article or of the bylaws, or who habitually neglects to pay his debts, or shall become insolvent or bankrupt. The members at a regularly called meeting may expel from the corporation any member who has become intemperate or in any way financially irresponsible; no member shall be expelled until he has been informed in writing of the charges against him and an opportunity has been given him, after reasonable notice, to be heard thereon.
- (25) In accordance with rules and regulations promulgated by the Administrator of Credit Unions, subject to the advice and consent of the Credit Union Commission, engage in any activity in which credit unions could engage if they were operating as federally chartered credit unions, if on investigation, the Administrator of Credit Unions finds it necessary to preserve and protect the welfare of the credit unions and to promote the general economy of this State.
- (26) Subject to rules and regulations prescribed by the Administrator, act as trustee or custodian, and may receive reasonable compensation for so acting, under any written trust instrument or custodial agreement created or organized and forming a part of a deferred compensation plan for its members or groups or organization of its members, provided the funds of such plans are invested in savings or deposits of the credit union. All funds held may be commingled for appropriate purpose of investment, but individual records shall be kept by the credit union for each participant and shall show in proper detail all transactions engaged in under authority of this section.

A member may withdraw from a credit union by filing a written notice of his intention to withdraw.

The amounts paid in on shares or deposits by an expelled or withdrawing member, with any dividends credited to his shares and any interest accrued on his deposits to the date of expulsion or withdrawal shall be paid to such member, but in the order of expulsion or withdrawal, and only as funds therefor become available, after deducting any amounts due to the corporation by such member. The member shall have no other or further right in the credit union or to any of its benefits, but such expulsion or withdrawal shall not operate to relieve the member from any remaining liability to the corporation. (1915, c. 115, ss. 5, 16, 17, 23; C.S., ss. 5216-5218, 5231; 1925, c. 73, ss. 3, 10; 1935, c. 87; 1965, c. 956, s. 8; 1975, c. 538, s. 1; 1977, c. 559, s. 5.)

Editor's Note. — Session Laws 1975, c. 538, s. 1, effective July 1, 1975, repealed Articles 9 through 14 of this Chapter and enacted in their place new Articles designated Articles 9 through 14A in the act, but which have been codified herein as Articles 14A through 14L.

Where appropriate, the historical citations to the repealed sections have been added to corresponding sections in the new Articles.

For act relating to withdrawal of deposits from the State Employees' Credit Union, see Session Laws 1943, c. 781.

§ 54-109.22. Incidental powers.

A credit union may exercise such incidental powers such as are necessary or requisite to enable it to promote and carry on most effectively its purposes. (1975, c. 538, s. 1.)

§§ 54-109.23 to 54-109.25: Reserved for future codification purposes.

ARTICLE 14D.

Membership.

§ 54-109.26. "Membership" defined.

(a) The membership of a credit union shall be limited to and consist of the subscribers to the articles of incorporation and such other persons within the common bond set forth in the bylaws as have been duly admitted members, have paid any required entrance fee or membership fee, or both, have subscribed for one or more shares, and have paid the initial installment thereon, and have complied with such other requirements as the articles of incorporation or bylaws specify.

(b) Credit union membership may include groups having a common bond of similar occupation, association or interest, or groups who reside within an identifiable neighborhood, community, or rural district, or employees of a common employer, and members of the immediate family of such persons. (1915, c. 115, s. 6; C.S., s. 5230; 1925, c. 73, s. 3; 1935, c. 87; 1965, c. 956, s. 18; 1975, c. 538, s. 1.)

Editor's Note. — Session Laws 1975, c. 538, s. 1, effective July 1, 1975, repealed Articles 9 through 14 of this Chapter and enacted in their place new Articles designated Articles 9 through 14A in the act, but which have been

codified herein as Articles 14A through 14L. Where appropriate, the historical citations to the repealed sections have been added to corresponding sections in the new Articles.

CASE NOTES

Legislative Intent as to "Common Bond" Requirement. — The clear legislative intent of this section is to invest the credit union incorporators with the prerogative to establish and describe the "common bond" of its members within the bounds of the three permissible groups described in subsection (b) of this section. *North Carolina Sav. & Loan League v. North Carolina Credit Union Comm'n*, 45 N.C. App. 19, 262 S.E.2d 361 (1980), rev'd on other grounds, 302 N.C. 458, 276 S.E.2d 404 (1981).

To qualify as a common bond within the meaning of this section, which provides that all persons eligible for membership in a credit

union must share one and the same common bond, the trait or factor must be common to all eligible membership, and its very nature must provide the assurance of stability. *North Carolina Sav. & Loan League v. North Carolina Credit Union Comm'n*, 302 N.C. 458, 276 S.E.2d 404 (1981).

County, Municipal and State Employees. — Because county, municipal and State employees do not all engage in similar types of work with similar job descriptions, they do not share a common bond of similar occupation, since similarity in occupation means similarity in the actual work done rather than similarity

in who is benefited and who pays; therefore, an amendment to the bylaws of the State Employees' Credit Union permitting an expansion of the field of membership to include certain county and municipal employees could not be upheld on this basis. *North Carolina Sav. & Loan League v. North Carolina Credit Union Comm'n*, 302 N.C. 458, 276 S.E.2d 404 (1981).

The class of persons eligible for membership in the State Employees' Credit Union under an amendment to the bylaws of the credit union

permitting an expansion of the field of membership to include certain county and municipal employees did not possess the common bond of similar association or interest, and limitation of membership to governmental employees covered under a State administered retirement system did not provide a common bond of similar interest. *North Carolina Sav. & Loan League v. North Carolina Credit Union Comm'n*, 302 N.C. 458, 276 S.E.2d 404 (1981).

§ 54-109.27. Societies and other associations.

Societies, and copartnerships composed primarily of individuals who are eligible to membership, and corporations whose stockholders are composed primarily of such individuals, may be admitted to membership in the same manner and under the same conditions as individuals, but may not borrow in excess of their shareholdings. Provided, however, secured loans in excess of shareholdings may be made to nonprofit societies, copartnerships, and corporations who are members. (1975, c. 538, s. 1; 1979, c. 809, s. 1.)

§ 54-109.28. Other credit unions.

Any credit union organized under Articles 14A to 14L of this Chapter may permit membership of any other credit union organized under Articles 14A to 14L of this Chapter or other acts. (1975, c. 538, s. 1.)

§ 54-109.29. Members who leave field.

Members who leave the field of membership may be permitted to retain their membership in the credit union as a matter of general policy of the board of directors. (1975, c. 538, s. 1.)

§ 54-109.30. Liability of shareholders.

A shareholder of any such corporation, unless the bylaws so provide, shall not be individually liable for the payment of its debts for an amount in excess of the par value of the shares which he owns or for which he has subscribed. (1975, c. 538, s. 1.)

§ 54-109.31. Meetings of members.

(a) The annual meeting and any special meetings of the members of the credit union shall be held at the time, place, and in the manner indicated by the bylaws.

(b) At all such meetings, a member shall have but one vote, irrespective of his shareholdings. No member may vote by proxy, but a member may vote by absentee ballot if the bylaws of the credit union so provide.

(c) A society, association, copartnership or corporation having membership in the credit union may be represented and have its vote cast by one of its members or shareholders, provided such person has been fully authorized by the organization's governing body.

(d) The board of directors may establish a minimum age of 16 years of age as a qualification to vote at meetings of the members.

(e) The board of directors may establish a minimum age of 18 years of age as a qualification to hold office. (1975, c. 538, s. 1.)

§§ 54-109.32 to 54-109.34: Reserved for future codification purposes.

ARTICLE 14E.

Direction of Affairs.

§ 54-109.35. Election or appointment of officials.

(a) The credit union shall be directed by a board of directors, at least five in number, to be elected at the annual members' meeting by and from the members. All members of the board shall hold office for such terms as the bylaws provide.

(b) The board of directors at its first meeting after its election shall appoint a supervisory committee from the membership (no more than one of whom may be a member of the board of directors and none a member of the credit committee) of not less than three members who shall serve for such terms as may be fixed by the bylaws; or in lieu thereof, the bylaws may authorize the board of directors to employ and use such clerical and auditing assistants as may be required to perform the duties required by G.S. 54-109.49. The board of directors may remove or suspend any member of the supervisory committee for neglect of duty, misfeasance, malfeasance, official misconduct, or for other good cause shown.

(c) The board of directors shall appoint a credit committee from the membership consisting of an odd number, not less than three, for such terms as the bylaws provide or, in lieu of a credit committee, appoint one or more loan officers from the membership and, in such instances, duties and responsibilities of the credit committee shall be carried out by such loan officer or officers. (1975, c. 538, s. 1.)

Editor's Note. — Session Laws 1975, c. 538, s. 1, effective July 1, 1975, repealed Articles 9 through 14 of this Chapter and enacted in their place new Articles designated Articles 9 through 14A in the act, but which have been

codified herein as Articles 14A through 14L. Where appropriate, the historical citations to the repealed sections have been added to corresponding sections in the new Articles.

§ 54-109.36. Record of board and committee members.

Within 15 days following the board of directors' initial or annual organization meeting, a record of the names and addresses of the members of the board, committees and all other officers of the credit union shall be filed with the Credit Union Division on forms provided by that Division. (1975, c. 538, s. 1.)

§ 54-109.37. Vacancies.

The board of directors shall fill any vacancies occurring in the board until successors elected at the next annual meeting have qualified. The board shall also fill vacancies in the credit and supervisory committees. (1975, c. 538, s. 1.)

§ 54-109.38. Compensation of officials.

No member of the board of directors or of the credit committee or supervisory committee shall be compensated for his service in this position, but providing reasonable life, health, accident and similar insurance protection for a director or committee member shall not be considered compensation. Directors and committee members, while on official business of the credit union, may be reimbursed for necessary expenses incidental to the performance of the business. (1975, c. 538, s. 1.)

§ 54-109.39. Conflicts of interest.

No director, committee member, officer, agent or employee of the credit union shall in any manner, directly or indirectly, participate in the deliberation upon or the determination of any question affecting his pecuniary interest or the pecuniary interest of any corporation, partnership, or association (other than the credit union) in which he is directly or indirectly interested. (1975, c. 538, s. 1.)

§ 54-109.40. Executive officers.

(a) At their organization meeting and within 30 days following each annual meeting of the members, the directors shall elect from their own number an executive officer, who may be designated as chairman of the board or president; a vice-chairman of the board or one or more vice-presidents; a treasurer; and a secretary. The treasurer and the secretary may be the same individual. The persons so elected shall be the executive officers of the corporation.

(b) The terms of the officers shall be one year, or until their successors are chosen and have duly qualified.

(c) The duties of the officers shall be prescribed in the bylaws.

(d) The board of directors may employ an officer in charge of operations whose title shall be either president and/or general manager; or, in lieu thereof, the board of directors may designate the treasurer or an assistant treasurer to act as general manager and be in active charge of the affairs of the credit union. (1975, c. 538, s. 1.)

§ 54-109.41. Authority of directors.

The board of directors shall have the general direction of the business affairs, funds, and records of the credit union. (1975, c. 538, s. 1.)

§ 54-109.42. Executive committee.

From the persons elected to the board, the board may appoint an executive committee of not less than three directors who may be authorized to act for the board in all respects, subject to such conditions and limitations as are prescribed by the board. (1975, c. 538, s. 1.)

§ 54-109.43. Meetings of directors.

The board of directors and the executive committee shall meet as often as the bylaws prescribe. (1915, c. 115, s. 8; C.S., s. 5232; 1975, c. 538, s. 1.)

§ 54-109.44. Duties of directors.

It shall be the duty of the directors to:

- (1) Act upon applications for membership or to appoint one or more membership officers to approve applications for membership under such conditions as the board prescribes. A record of a membership officer's approval or denial of membership shall be available to the board of directors for inspection. A person denied membership by a membership officer may appeal the denial to the board;
- (2) Purchase a blanket fidelity bond, in accordance with any rules and regulations of the Administrator, to protect the credit union against losses caused by occurrences covered therein such as fraud, dishonesty, forgery, embezzlement, misappropriation, misapplication, or unfaithful performance of duty by a director, officer, employee, member of an official committee, attorney-at-law or other agent;

- (3) Determine from time to time the interest rate or rates consistent with Articles 14A to 14L of this Chapter, which shall be charged on loans and to authorize interest refunds, if any, to members from income earned and received in proportion to the interest paid by them on such classes of loans and under such conditions as the board prescribes;
- (4) Fix from time to time the maximum amount which may be loaned to any one member;
- (5) Declare dividends on shares in the manner and form as provided in the bylaws; and determine the interest rate or rates which will be paid on deposits;
- (6) Set the number of shares and the amount of deposits which may be owned by a member, such limitations to apply alike to all members;
- (7) Have charge of the investment of surplus funds, except that the board of directors may designate an investment committee or any qualified individual to have charge of making investments under controls established by the board of directors;
- (8) Authorize the employment of such persons necessary to carry on the business of the credit union;
- (9) Authorize the conveyance of property;
- (10) Borrow or lend money to carry on the functions of the credit union;
- (11) Designate a depository or depositories for the funds of the credit union;
- (12) Suspend any or all members of the credit or supervisory committee for failure to perform their duties;
- (13) Appoint any special committees deemed necessary; and
- (14) Perform such other duties as the members from time to time direct, and perform or authorize any action not inconsistent with Articles 14A to 14L of this Chapter and not specifically reserved by the bylaws for the members. (1915, c. 115, s. 10; C.S., s. 5234; 1957, c. 989, s. 5; 1965, c. 956, s. 20; 1973, c. 199, s. 9; 1975, c. 538, s. 1.)

§ 54-109.45. Authority of credit committee.

The credit committee shall have the general supervision of all loans to members. (1915, c. 115, s. 11; C.S., s. 5235; 1961, c. 1187, s. 22; 1965, c. 956, s. 1; 1969, c. 69, s. 5; 1973, c. 199, s. 10; 1975, c. 538, s. 1.)

§ 54-109.46. Meetings of credit committee.

The credit committee shall meet as often as the business of the credit union requires and not less frequently than once a month to consider applications for loans. No loan shall be made unless it is approved by a majority of the committee who are present at the meeting at which the application is considered. (1915, c. 115, s. 11; C.S., s. 5235; 1961, c. 1187, s. 22; 1965, c. 956, s. 1; 1969, c. 69, s. 5; 1973, c. 199, s. 10; 1975, c. 538, s. 1.)

§ 54-109.47. Loan officers.

(a) The credit committee may appoint one or more loan officers and delegate the power to approve loans, subject to such limitations or conditions as the credit committee prescribes.

(b) Loan applications not approved by a loan officer shall be reviewed and acted upon by the credit committee. (1915, c. 115, s. 11; C.S., s. 5235; 1961, c. 1187, s. 22; 1965, c. 956, s. 1; 1969, c. 69, s. 5; 1973, c. 199, s. 10; 1975, c. 538, s. 1.)

§ 54-109.48. When credit committee dispensed with.

The credit committee may be dispensed with, and loan officer(s) empowered to approve or disapprove loans under conditions prescribed by the board of directors. In the event the credit committee is dispensed with, the procedures prescribed in G.S. 54-109.45, 54-109.46 and 54-109.47 do not apply, and no loans shall be made unless approved by the loan officer(s). (1915, c. 115, s. 11; C.S., s. 5235; 1961, c. 1187, s. 22; 1965, c. 956, s. 1; 1969, c. 69, s. 5; 1973, c. 199, s. 10; 1975, c. 538, s. 1.)

§ 54-109.49. Duties of supervisory committee.

The supervisory committee shall make or cause to be made an annual audit, in accordance with rules and regulations promulgated by the Administrator of Credit Unions, and shall submit a report of that audit to the board of directors and a summary of the report to the members at the next annual meeting of the credit union. The supervisory committee shall make or cause to be made such supplemental audits as deemed necessary by it or as may be ordered by the Administrator of Credit Unions. Any violation of this Article or of the bylaws or of any practice of the corporation which in the opinion of the supervisory committee is unsafe, unsound, or unauthorized, shall be reported to the board of directors and the Administrator of Credit Unions within seven days after its discovery. (1915, c. 115, s. 12; C.S., s. 5236; 1965, c. 956, s. 21; 1973, c. 199, s. 11; 1975, c. 538, s. 1.)

§§ 54-109.50 to 54-109.52: Reserved for future codification purposes.

ARTICLE 14F.***Savings Accounts.*****§ 54-109.53. Shares.**

(a) The capital of a credit union consists of the payments made by members on shares, undivided surplus, and reserves.

(b) Shares may be subscribed to, paid for and transferred in such manner as the bylaws prescribe.

(c) A certificate need not be issued to denote ownership of a share in a credit union. (1915, c. 115, s. 13; C.S., s. 5226; 1925, c. 73, s. 3; 1935, c. 87; 1965, c. 956, ss. 16, 17; 1975, c. 538, s. 1.)

Editor's Note. — Session Laws 1975, c. 538, s. 1, effective July 1, 1975, repealed Articles 9 through 14 of this Chapter and enacted in their place new Articles designated Articles 9 through 14A in the act, but which have been

codified herein as Articles 14A through 14L. Where appropriate, the historical citations to the repealed sections have been added to corresponding sections in the new Articles.

§ 54-109.54. Dividends.

The board of directors of any credit union may declare dividends as its bylaws provide. Dividends shall be paid on fully paid shares outstanding at the close of the accounting period, but shares which become fully paid by the tenth of any month of the period may be entitled to a proportional part of such dividend, calculated from the first day of the month. (1915, c. 115, s. 22; C.S., s. 5223; 1925, c. 73, s. 3; 1935, c. 87; 1957, c. 989, s. 3; 1965, c. 956, s. 15; 1969, c. 69, ss. 3, 4; 1973, c. 199, s. 7; 1975, c. 538, s. 1.)

§ 54-109.55. Deposits.

A credit union may receive on deposit the savings of its members and also nonmembers in such amounts and upon such terms as the board of directors may determine and the bylaws shall provide. (1915, c. 115, s. 16; C.S., s. 5217; 1925, c. 73, s. 3; 1935, c. 87; 1975, c. 538, s. 1.)

§ 54-109.56. Thrift accounts.

Christmas clubs, vacation clubs, and other thrift accounts may be operated under conditions established by the board of directors. (1975, c. 538, s. 1.)

§ 54-109.57. Shares and deposits for minors and in trust.

Shares may be issued and deposits received in the name of a minor, and such shares and deposits may, in the discretion of the directors, be withdrawn by such minor or his parent or guardian, and in either case payments made on such withdrawals shall be valid. If shares are held or deposits made in trust, the name and residence of the beneficiary shall be disclosed and the account shall be kept in the name of such holder as trustee for such person. Such shares or deposits may, upon the death of the trustee, be withdrawn by the person for whom the shares were held or for whom such deposits were made, or by his legal representatives. (1915, c. 115, s. 14; C.S., s. 5227; 1975, c. 538, s. 1.)

§ 54-109.58. Joint accounts.

(a) A member may designate any person or persons to hold shares, deposits and thrift club accounts with him in joint tenancy with the right of survivorship, but no joint tenant, unless a member in his own right, shall be permitted to vote, obtain loans, or hold office or be required to pay an entrance or membership fee.

(b) Payment of part or all of such accounts to any of the joint tenants shall, to the extent of such payment, discharge the liability to all. (1975, c. 538, s. 1.)

§ 54-109.59. Liens.

The credit union shall have a lien on the shares, deposits and accumulated dividends or interest of a member in his individual, joint or trust account, for any sum past due the credit union from said member or for any loan endorsed by him. (1915, c. 115, s. 13; C.S., s. 5226; 1925, c. 73, s. 3; 1935, c. 87; 1965, c. 956, ss. 16, 17; 1975, c. 538, s. 1.)

§ 54-109.60: Repealed by Session Laws 1977, c. 559, s. 6.**§ 54-109.61. Reduction in shares.**

(a) Whenever the losses of any credit union, resulting from a depreciation in value of its loans or investments or otherwise, exceed its undivided earnings and reserve fund so that the estimated value of its assets is less than the total amount due the shareholders, the credit union may by a majority vote of the members present at a special meeting called for that purpose order a reduction in the shares of each of its shareholders to divide the loss proportionately among the members.

(b) If the credit union thereafter realizes from such assets a greater amount than was fixed by the order of reduction, such excess shall be divided proportionately among the shareholders whose assets were reduced, but only to the extent of such reduction. (1975, c. 538, s. 1.)

§§ 54-109.62 to 54-109.64: Reserved for future codification purposes.

ARTICLE 14G.

Loans.

§ 54-109.65. Purposes, terms and interest rate.

A credit union may loan to its members for such purpose and upon such security and terms as the board of directors prescribe, at rates of interest not exceeding twelve [percent] (12%) annual percentage rate, unless a greater rate not to exceed eighteen [percent] (18%) annual percentage rate is otherwise approved by the Credit Union Commission. Such action by the Commission will be uniform and apply to all credit unions.

The term "interest," as used in this section, shall not be deemed to include charges made by a credit union for appraisals of real or personal property; attorneys' fees for searching title to real property, preparing notes, deeds of trust, mortgages and closing loans; and recording fees. Rate of interest and terms of repayment shall appear on each note but the corporation may, for the purpose of making loans, discount and negotiate promissory notes and deduct in advance, from the proceeds of such loan, interest at a rate not to exceed the rate herein fixed, which shall be the legal rate for corporations organized under this Article, and such deductions shall be made upon the amount of the loan from the date thereof until the maturity of the final installment, notwithstanding that the principal amount of such loan is required to be repaid in such installments. (1915, c. 115, ss. 19, 20; 1917, c. 232, s. 4; C.S., ss. 5220, 5221; 1925, c. 73, s. 3; 1935, c. 87; 1955, c. 1135, s. 2; 1957, c. 989, s. 2; 1961, c. 1187, s. 1; 1965, c. 956, ss. 1, 12, 13; 1969, c. 69, s. 9; 1973, c. 199, ss. 5, 6; 1975, c. 538, s. 1.)

Editor's Note. — Session Laws 1975, c. 538, s. 1, effective July 1, 1975, repealed Articles 9 through 14 of this Chapter and enacted in their place new Articles designated Articles 9 through 14A in the act, but which have been

codified herein as Articles 14A through 14L. Where appropriate, the historical citations to the repealed sections have been added to corresponding sections in the new Articles.

OPINIONS OF ATTORNEY GENERAL

Loans Need Not Be Repaid in Installments. — See 40 N.C.A.G. 49 (1969) (rendered under former § 54-88).

§ 54-109.66. Application.

Every application for a loan shall be made in writing upon a form, which the board of directors prescribe. The application shall state the purpose for which the loan is desired, and the security, if any, offered. Each loan shall be evidenced by a written document. (1975, c. 538, s. 1.)

§ 54-109.67. Loan limit.

No loan shall be made to any member in an aggregate amount in excess of two hundred dollars (\$200.00), or ten percent (10%) of the credit union's unimpaired capital and surplus, whichever is greater, provided that no unsecured loan shall be greater than five thousand dollars (\$5,000). (1915, c.

115, s. 19; 1917, c. 232, s. 4; C.S., s. 5220; 1925, c. 73, s. 3; 1935, c. 87; 1955, c. 1135, s. 2; 1961, c. 1187, s. 1; 1965, c. 956, ss. 1, 12, 13; 1969, c. 69, s. 9; 1973, c. 199, s. 5; 1975, c. 538, s. 1.)

§ 54-109.68. Security.

In addition to generally accepted types of security, the endorsement of a note by a surety, comaker or guarantor, or assignment of shares, in a manner consistent with the laws of this State, shall be deemed security within the meaning of Articles 14A to 14L of this Chapter. The adequacy of any security shall be determined by the board of directors subject to Articles 14A to 14L of this Chapter and the bylaws. (1975, c. 538, s. 1.)

§ 54-109.69. Installments.

A member may receive a loan in installments, or in one sum, and may pay the whole or any part of his loan on any day on which the office of the credit union is open for business. (1975, c. 538, s. 1.)

§ 54-109.70. Line of credit.

A line of credit and advances may be granted to each member within guidelines established by the board of directors. Where a line of credit has been approved, no additional loan applications are required as long as the aggregate obligation does not exceed the limit of such line of credit. (1975, c. 538, s. 1.)

§ 54-109.71. Other loan programs.

(a) A credit union may participate in loans to credit union members jointly with other credit unions, corporations, or financial organizations.

(b) A credit union may participate in guaranteed loan programs of the federal and State government.

(c) A credit union may purchase the conditional sales contracts, notes and similar instruments of its members. (1975, c. 538, s. 1.)

§§ 54-109.72 to 54-109.74: Reserved for future codification purposes.

ARTICLE 14H.

Insurance and Group Purchasing.

§ 54-109.75. Insurance for members.

(a) A credit union may purchase or make available insurance for its members in amounts related to their respective ages, shares, deposits or loan balances or to any combination of them.

(b) A credit union may enter into cooperative marketing arrangements to facilitate its members' voluntary purchase of insurance including, but not by way of limitation, life insurance, disability insurance, accident and health insurance, property insurance, liability insurance, and legal expense insurance. (1975, c. 538, s. 1.)

Editor's Note. — Session Laws 1975, c. 538, s. 1, effective July 1, 1975, repealed Articles 9 through 14 of this Chapter and enacted in their place new Articles designated Articles 9 through 14A in the act, but which have been

codified herein as Articles 14A through 14L. Where appropriate, the historical citations to the repealed sections have been added to corresponding sections in the new Articles.

§ 54-109.76. Liability insurance for officers.

A credit union may purchase and maintain liability insurance on behalf of any person who is or was a director, officer, employee, or agent of the credit union, or who is or was serving at the request of the credit union as a director, officer, employee, or agent of another corporation, partnership, joint venture, trust or other enterprise against any liability asserted against such person and incurred by such person in any such capacity or arising out of such person's status as such, whether or not the credit union would have the power to indemnify such person against such liability. (1975, c. 538, s. 1.)

§ 54-109.77. Group purchasing.

A credit union may enter into cooperative marketing arrangements to facilitate its members' voluntary purchase of such goods and services as are in the interest of improving economic and social conditions of the members. (1975, c. 538, s. 1.)

§ 54-109.78. Share and deposit insurance.

(a) All credit unions established under this Chapter shall, no later than July 1, 1976, apply for insurance of member share and deposit accounts from any mutual deposit guaranty association which qualifies under Article 7A of Chapter 54 of the General Statutes (Mutual Deposit Guaranty Associations), or from the National Credit Union Administration under the Federal Credit Union Act. All such credit unions shall, on or before January 1, 1977, obtain and thereafter maintain the above-mentioned insurance. A credit union which is unable to obtain a commitment for insurance of the share and deposit accounts within the time limit specified above shall be dissolved by action of the Administrator of Credit Unions or permitted to merge with another credit union. Provided, the Administrator may grant additional time to obtain the insurance commitment, upon satisfactory evidence that the credit union has made or is making a substantial effort to achieve the conditions precedent to issuance of the commitment. Granting of additional time or times to obtain the insurance commitment shall not extend later than January 1, 1978.

(b) All credit unions chartered under Articles 14A to 14L of this Chapter after ratification shall apply for and obtain insurance as a condition to granting the charter. (1975, c. 538, s. 1.)

§§ 54-109.79 to 54-109.81: Reserved for future codification purposes.

ARTICLE 14-I.***Investments.*****§ 54-109.82. Investment of funds.**

The capital, deposits, undivided profits and reserve fund of the corporation may be invested in any of the following ways, and in such ways only:

- (1) They may be lent to the members of the corporation in accordance with the provisions of this Chapter.
- (2) In capital shares, obligations, or preferred stock issues of any agency or association organized either as a stock company, mutual association, or membership corporation, provided the membership or stockholdings, as the case may be, of such agency or association are confined or restricted to credit unions or organizations of credit

unions, or provided the purposes for which such agency or association is organized or designed to service or otherwise assist credit union operations.

- (3) In obligations of the State of North Carolina or any subdivision thereof.
- (4) In obligations of the United States, including bonds and securities upon which payment of principal and interest is fully guaranteed by the United States.
- (5) They may be deposited to the credit of the corporation in savings banks, credit unions, savings and loan associations, State banks or trust companies incorporated under the laws of the State, or in national banks located therein.
- (6) In loans to other credit unions in any amount not to exceed twenty-five percent (25%) of the shares and unimpaired surplus of the lending credit union.
- (7) In an aggregate amount not to exceed twenty-five percent (25%) of the allocations to the reserve fund in any agency or association of the type described in subdivision (2) hereof, provided the purposes of any such agency or association are designed to assist in establishing and maintaining liquidity, solvency, and security in credit union operations.
- (8) In the North Carolina Savings Guaranty Corporation.
- (9) In any form of investment allowed by law to the State Treasurer under G.S. 147-69.1.
- (10) Debentures which are issued by an agency of the United States government.
- (11) In the College Foundation in any amount not to exceed ten percent (10%) of the shares and unimpaired surplus of the investing credit union.
- (12) They may be placed on time deposits in any banks insured by the Federal Deposit Insurance Corporation or may be deposited or may be invested in any savings or building and loan association insured by the Federal Savings and Loan Insurance Corporation. (1915, c. 115, s. 18; 1917, c. 232, ss. 2, 3; C.S., s. 5219; 1925, c. 73, ss. 12, 13, 14; 1935, c. 87; 1939, c. 400, s. 1; 1947, c. 781; 1965, c. 956, ss. 10, 11; 1969, c. 69, s. 1; 1973, c. 199, s. 4; c. 1255, s. 1; 1975, c. 538, s. 1; 1977, c. 559, s. 7; 1979, c. 467, s. 23; c. 809, s. 2.)

Editor's Note. — Session Laws 1975, c. 538, s. 1, effective July 1, 1975, repealed Articles 9 through 14 of this Chapter and enacted in their place new Articles designated Articles 9 through 14A in the act, but which have been

codified herein as Articles 14A through 14L. Where appropriate, the historical citations to the repealed sections have been added to corresponding sections in the new Articles.

OPINIONS OF ATTORNEY GENERAL

Credit Unions May Invest in Government Securities Program. — See opinion of Attorney General to Mr. W.V. Didawick, Admin-

istrator, Credit Union Division, Department of Agriculture, 40 N.C.A.G. 50 (1970).

§§ 54-109.83 to 54-109.85: Reserved for future codification purposes.

ARTICLE 14J.

*Reserve Allocations.***§ 54-109.86. Transfers to regular reserve.**

(a) At the end of each accounting period the gross income shall be determined. From this amount, there shall be set aside, as a regular reserve against losses on loans and against such other losses as may be specified in regulations prescribed pursuant to law, sums in accordance with the following schedule:

- (1) A credit union in operation for more than four years and having assets of five hundred thousand dollars (\$500,000) or more shall set aside
 - (a) Ten per centum (10%) of gross income until the regular reserve shall equal four per centum (4%) of the total of outstanding loans and risk assets, then
 - (b) Five per centum (5%) of gross income until the regular reserve shall equal six per centum (6%) of the total of outstanding loans and risk assets.
- (2) A credit union in operation less than four years or having assets of less than five hundred thousand dollars (\$500,000) shall set aside
 - (a) Ten per centum (10%) of gross income until the regular reserve shall equal seven and one-half per centum (7½%) of the total of outstanding loans and risk assets, then
 - (b) Five per centum (5%) of gross income until the regular reserve shall equal ten per centum (10%) of the total outstanding loans and risk assets.
- (3) Whenever the regular reserve falls below the stated per centum of the total of outstanding loans and risk assets, it shall be replenished by regular contributions in such amounts as may be determined by the Administrator to maintain the stated reserve goals.
- (b) The Administrator, with the advice and consent of the Credit Union Commission, may increase or decrease the reserve requirement set forth in subsection (a) of this section when such an increase or decrease is deemed necessary or desirable in order to conform to the reserve requirements of federally chartered credit unions.
- (c) In addition to such regular reserve, special reserves to protect the interests of members shall be established:
 - (1) When required by regulation; or
 - (2) When found by the Administrator, in any special case, to be necessary for that purpose.
- (d) Nothing in this section shall be construed as limiting the amount that a credit union may set apart to its reserve fund. (1915, c. 115, s. 21; C.S., s. 5222; 1939, c. 400, s. 2; 1955, c. 1135, s. 1; 1969, c. 69, ss. 2, 10; 1975, c. 538, s. 1; 1979, c. 293.)

Editor's Note. — Session Laws 1975, c. 538, s. 1, effective July 1, 1975, repealed Articles 9 through 14 of this Chapter and enacted in their place new Articles designated Articles 9 through 14A in the act, but which have been

codified herein as Articles 14A through 14L. Where appropriate, the historical citations to the repealed sections have been added to corresponding sections in the new Articles.

§ 54-109.87. Use of regular reserve.

The regular reserve shall belong to the credit union and shall be used to meet losses except those resulting from an excess of expenses over income and shall not be distributed except on liquidation of the credit union, or in accordance with a plan approved by the Administrator of Credit Unions. (1975, c. 538, s. 1.)

§ 54-109.88. "Risk assets" defined.

For the purpose of establishing the reserves required by G.S. 54-109.86, all assets except the following shall be considered risk assets:

- (1) Cash on hand.
- (2) Deposits and shares in federal or State banks, savings and loan associations, and credit unions.
- (3) Assets which are issued by, fully guaranteed as to principal and interest by, or due from the U.S. government, its agencies, the Federal National Mortgage Association, or the Government National Mortgage Association.
- (4) Loans to other credit unions.
- (5) Loans to students insured under the provision of Title IV, Part B of the Higher Education Act of 1965 (20 U.S.C. 1071, et seq.) or similar state insurance programs.
- (6) Loans insured under Title I of the National Housing Act (12 U.S.C. 1703) by the Federal Housing Administration.
- (7) Shares or deposits in central credit unions organized under Article 14-I of this Chapter of any other State act or of the Federal Credit Union Act.
- (8) Common trust investments which deal in investments authorized by Articles 14A to 14L of this Chapter.
- (9) Prepaid expenses.
- (10) Accrued interest on nonrisk investments.
- (11) Furniture and equipment.
- (12) Land and buildings.
- (13) Loans secured by shares.
- (14) Deposits in mutual savings guaranty associations which qualify under Article 7A of Chapter 54 of the General Statutes.
- (15) Investments in the College Foundation. (1975, c. 538, s. 1; 1977, c. 559, s. 8.)

§§ 54-109.89 to 54-109.91: Reserved for future codification purposes.

ARTICLE 14K.***Change in Corporate Status.*****§ 54-109.92. Suspension.**

(a) If it appears that any credit union is bankrupt or insolvent, or that it has willfully violated Articles 14A to 14L of this Chapter, or is operating in an unsafe or unsound manner, the Administrator of Credit Unions shall issue an order temporarily suspending the credit union's operations for not more than 90 days. The board of directors shall be given notice by registered mail of such suspension, which notice shall include a list of the reasons for such suspension, and/or a list of the specific violations of Articles 14A to 14L of this Chapter. The Administrator of Credit Unions shall also notify the members of the Credit Union Commission of any suspension.

(b) Upon receipt of such suspension notice, the credit union shall cease all operations, except those authorized by the Administrator. The board of directors shall then file with the Administrator a reply to the suspension notice, and may request a hearing to present a plan of corrective actions proposed if it desires to continue operations. The board may request that the credit union be declared insolvent and a liquidating agent be appointed.

(c) Upon receipt from the suspended credit union of evidence that the conditions causing the order of suspension have been corrected, the Administrator may revoke the suspension notice, permit the credit union to resume normal operations, and notify the Commission of such action.

(d) If the Administrator, after issuing notice of suspension and providing an opportunity for a hearing, rejects the credit union's plan to continue operations, he may appoint an operating officer or trustee to correct the conditions causing the order of suspension, or he may issue a notice of involuntary liquidation and appoint a liquidating agent. The credit union may request the appropriate court to stay execution of such action. Involuntary liquidation may not be ordered prior to the conclusion of suspension procedures outlined in this section.

(e) If, within the suspension period, the credit union fails to answer the suspension notice or request a hearing, the Administrator may then revoke the credit union's charter, appoint a liquidating agent and liquidate the credit union. (1975, c. 538, s. 1; 1977, c. 559, s. 9.)

Editor's Note. — Session Laws 1975, c. 538, s. 1, effective July 1, 1975, repealed Articles 9 through 14 of this Chapter and enacted in their place new Articles designated Articles 9 through 14A in the act, but which have been

codified herein as Articles 14A through 14L. Where appropriate, the historical citations to the repealed sections have been added to corresponding sections in the new Articles.

§ 54-109.93. Liquidation.

(a) A credit union may elect to dissolve voluntarily and liquidate its affairs in the manner prescribed in this section.

(b) The board of directors shall adopt a resolution recommending the credit union be dissolved voluntarily, and directing that the question of liquidation be submitted to the members.

(c) Within 10 days after the board of directors decides to submit the question of liquidation to the members, the president shall notify the Administrator of Credit Unions thereof in writing, setting forth the reasons for the proposed action. Within 10 days after the members act on the question of liquidation, the president shall notify the Administrator in writing as to whether or not the members approved the proposed liquidation.

(d) As soon as the board of directors decides to submit the question of liquidation to the members, payment on shares, withdrawal of shares, making any transfer of shares to loans and interest, making investments of any kind, and granting loans shall be suspended pending action by members on the proposal to liquidate. On approval by the members of such proposal, all such business transactions shall be permanently discontinued. Necessary expenses of operation shall, however, continue to be paid on authorization of the board of directors or liquidating agent during the period of liquidation.

(e) For a credit union to enter voluntary liquidation, approval by a majority of the members in writing or by a two-thirds majority of the members present at a regular or special meeting of the members is required. Where authorization for liquidation is to be obtained at a meeting of the members, notice in writing shall be given to each member, by first-class mail, at least 10 days prior to such meeting.

(f) A liquidating credit union shall continue in existence for the purpose of discharging its debts, collecting and distributing its assets, and doing all acts required in order to wind up its business and may sue and be sued for the purpose of enforcing such debts and obligations until its affairs are fully adjusted.

(g) The board of directors or the liquidating agent shall use the assets of the credit union to pay: first, expenses incidental to liquidating including any surety bond that may be required; second, any liability due nonmembers; third, deposits and special purpose thrift accounts as provided in Articles 14A to 14L of this Chapter. Assets then remaining shall be distributed to the members proportionately to the shares held by each member as of the date dissolution was voted.

(h) As soon as the board of directors or the liquidating agent determines that all assets from which there is a reasonable expectancy of realization have been liquidated and distributed as set forth in this section, the Administrator of Credit Unions shall issue to such corporation, in duplicate, a certificate of dissolution which shall be filed by the corporation in the office of the register of deeds of the county in which the corporation has its place of business. The corporation shall then be dissolved and its certificate of incorporation revoked. All pertinent books and records of the liquidating credit union shall be retained by the liquidating agent and/or filed with the Credit Union Division and kept for a minimum period not to exceed five years. The liquidating agent's fee, if any, shall be set by the Administrator of Credit Unions. (1915, c. 115, s. 24; C.S., s. 5224; 1925, c. 73, ss. 3, 15; 1935, c. 87; 1957, c. 989, s. 4; 1965, c. 956, s. 1; 1967, c. 823, s. 11; 1975, c. 538, s. 1.)

§ 54-109.94. Merger.

Any credit union may, with the approval of the Administrator of Credit Unions, merge with another credit union subject to the rules and regulations set forth by the Administrator of Credit Unions. (1975, c. 538, s. 1.)

§ 54-109.95. Conversion of charter.

(a) A credit union chartered under the laws of this State may be converted to a credit union chartered under the laws of any other state or under the laws of the United States, subject to regulations issued by the Administrator of the Credit Union Division.

(b) A credit union chartered under the laws of the United States or of any other state may convert to a credit union chartered under the laws of this State. To effect such a conversion, a credit union must comply with all the requirements of the jurisdiction under which it was originally chartered and the requirements of the Administrator of Credit Unions and file proof of such compliance with said Administrator. (1965, c. 956, s. 9; 1975, c. 538, s. 1.)

§§ 54-109.96 to 54-109.98: Reserved for future codification purposes.

ARTICLE 14L.

*Taxation.***§ 54-109.99. Restriction of taxation.**

The corporation shall be deemed an institution for savings, and together with all accumulations therein shall not be taxable under any law which shall exempt building and loan associations or institutions for savings from taxation; nor shall any law passed taxing corporations in any form, or the shares thereof, or the accumulations therein, be deemed to include corporations doing business in pursuance of the provisions of this Article, unless they are specifically named in such law. The shares of credit unions, being hereby regarded as a system for saving, shall not be subject to any stock-transfer tax either when issued by the corporation or transferred from one member to another. (1915, c. 115, s. 26; C.S., s. 5225; 1925, c. 73, ss. 3, 16; 1935, c. 87; 1975, c. 538, s. 1.)

Editor's Note. — Session Laws 1975, c. 538, s. 1, effective July 1, 1975, repealed Articles 9 through 14 of this Chapter and enacted in their place new Articles designated Articles 9 through 14A in the act, but which have been

codified herein as Articles 14A through 14L. Where appropriate, the historical citations to the repealed sections have been added to corresponding sections in the new Articles.

CASE NOTES

Cited in North Carolina Sav. & Loan League v. North Carolina Credit Union Comm'n, 302 N.C. 458, 276 S.W.2d 404 (1981).

§§ 54-109.100 to 54-109.104: Reserved for future codification purposes.

ARTICLE 14M.

*Confidential Information.***§ 54-109.105. What information deemed confidential; disclosure; certain information deemed public; exchange of information.**

(a) The following records of information of the credit union division, the Administrator or the agent(s) of either shall be confidential and shall not be disclosed:

- (1) Information obtained or compiled in preparation of, during, or as a result of an examination, audit or investigation of any credit union;
- (2) Information reflecting the specific collateral given by a named borrower, or specific withdrawable accounts held by a named member;
- (3) Information obtained, prepared or compiled during or as a result of an examination, audit or investigation of any credit union by an agency of the United States, if the records would be confidential under federal law or regulation;

- (4) Information and reports submitted by credit unions to federal regulatory agencies, if the records or information would be confidential under federal law or regulation;
 - (5) Information and records regarding complaints from the members received by the division which concern credit unions when the complaint would or could result in an investigation, except to the management of those credit unions;
 - (6) Any other letters, reports, memoranda, recordings, charts or other documents or records which would disclose any information of which disclosure is prohibited in this subsection.
- (b) A court of competent jurisdiction may order the disclosure of specific information.
- (c) The information contained in an application for a new credit union shall be deemed to be public information.
- (d) Nothing in this Article shall prevent the exchange of information relating to credit unions and the business thereof with the representatives of the agencies of this State, other states, or of the United States, or with reserve or insuring agencies for credit unions. Nothing in this Article shall prevent the Administrator, in his discretion, from disclosing pertinent information relating to a credit union and the business thereof with directors, officers, or members of the credit union. The private business and affairs of an individual or company shall not be disclosed by any person employed by the credit union division, or by any person with whom information is exchanged under the authority of this subsection.
- (e) Any official or employee violating this section shall be liable to any person injured by disclosure of such confidential information for all damages sustained thereby. Penalties provided shall not be exclusive of other penalties.
- (f) The willful or knowing violation of the provisions of this Article by any employee of the credit union division shall be a misdemeanor. (1981, c. 512.)

ARTICLE 15.

Central Associations.

§ 54-110. Central association.

- (a) Upon application of seven or more credit unions for a central corporation for the purpose of securing credit and discounting notes with any outside agency, and to act as a clearinghouse in the settlement of these accounts, the Administrator of Credit Unions shall, upon receipt and investigation of charters and bylaws signed by the secretary-treasurers of the several credit unions, approve same if he is satisfied they are in conformity with and give reasonable assurance that the affairs of the corporation will be administered in accordance with this Article.
- (b) Except as provided elsewhere in this section, the procedure and plan of organization, method of operation, officers and their duties, supervision, liquidation and dissolution shall be the same as with any local credit union; except that the membership of a central credit union shall be institutional and only local credit unions can become members, unless the bylaws otherwise prescribe.
- (c) Any local credit union can become a member of a central association by subscribing to any number of shares and paying for same, in whole or in part, not to be in excess of twenty-five percent (25%) of their share capital and reserve fund.
- (d) Deposits in the central association may be accepted from any source in such amounts and upon such terms as the board of directors may determine and the bylaws shall prescribe.

(e) The secretary-treasurer shall cast the one vote of local member credit unions in its annual election of officers and at all meetings of the member associations unless the bylaws otherwise prescribe.

(f) A central credit union shall not charge more than three fourths of one percent ($\frac{3}{4}$ of 1%) for discounting paper, provided that no discount rate shall make the interest higher than the legal rate.

(g) Section 54-109.21 shall not apply to a central association, and such an association shall have power to borrow money from any source in amounts not in excess of 10 times the amount of its capital and reserve fund.

(h) A central credit union shall not be taxable under any law which shall exempt any local credit union.

(i) Section 54-109.82(6) shall not apply to a central association, and such association shall have the power to invest in loans to other credit unions in such amounts as approved by its loan officer and/or credit committee.

(j) The board of directors shall meet at least quarterly and shall have the general direction and control of the affairs of the corporation. (1925, c. 73, s. 17; 1935, c. 87; 1965, c. 956, s. 1; 1973, c. 1255, ss. 2, 3; 1975, c. 538, ss. 2, 3.)

SUBCHAPTER IV. COOPERATIVE ASSOCIATIONS.

ARTICLE 16.

Organization of Associations.

§ 54-111. Nature of the association.

Any number of persons, not less than five, may associate themselves as a mutual association, society, company, or exchange, for the purpose of conducting any agricultural, housing (including apartment housing), horticultural, forestry, dairy, mercantile, mining, manufacturing, telephone, electric light, power, storage, refrigeration, flume, irrigation, water, sewerage, or mechanical business, or purchase, maintain and use fire-fighting equipment, on the mutual plan. For the purposes of this Subchapter, the words association, company, corporation, exchange, society, or union shall be construed to mean the same; provided that the membership of agricultural organizations incorporated under this Subchapter shall consist of producers of agricultural products, handled by such organizations or by organizations owned and controlled by such producers. (1915, c. 144, s. 1; C.S., s. 5242; 1925, c. 179, ss. 1, 2; 1931, c. 447; 1949, c. 1042, ss. 1, 2(a); 1955, c. 746, s. 1; 1959, c. 991.)

§ 54-111.1: Repealed by Session Laws 1959, c. 991.

§ 54-112. Use of term restricted.

No corporation or association hereafter organized or doing business for profit in this State shall be entitled to use the term "mutual" as part of its corporate or other business name or title, unless it has complied with the provisions of this Subchapter; and any corporation or association violating the provisions of this section may be enjoined from doing business under such name at the instance of any shareholder of any association legally organized under this Subchapter. (1915, c. 144, s. 18; C.S., s. 5243; 1925, c. 179, s. 1; 1945, c. 635.)

§ 54-113. Articles of agreement.

The persons desiring to organize such association shall sign and acknowledge written articles which shall contain the name of the association and the names and residences of the persons forming the same. Such articles shall also contain a statement of the purposes of the association and shall designate the city, town, or village where its principal place of business shall be located. The articles shall also state the amount of authorized capital stock, the number of shares subscribed, and the par value of each. No shareholder in any corporation organized under this Subchapter shall be personally liable for any debt of the corporation. (1915, c. 144, s. 2; C.S., s. 5244.)

§ 54-114. Certificate of incorporation.

The original articles of incorporation of corporations organized under this Subchapter, or a true copy thereof, verified as such by the affidavits of two of the signers thereof, shall be filed with the Secretary of State. A like verified copy of such articles and certificate of the Secretary of State, showing the date when such articles were filed with and accepted by the Secretary of State, within 30 days of such filing and acceptance, shall be filed with and recorded by the register of deeds of the county in which the principal place of business of the corporation is to be located, and no corporation shall, until such articles be left for record, have legal existence. The register of deeds shall forthwith transmit to the Secretary of State a certificate stating the time when such copy was recorded. Upon a receipt of such certificate, the Secretary of State shall issue a certificate of incorporation. (1915, c. 144, s. 3; C.S., s. 5245; 1967, c. 823, s. 12.)

§ 54-115. Fees for incorporation.

For filing the articles of incorporation of corporations organized under this Subchapter, there shall be paid the Secretary of State ten dollars (\$10.00) and his fees allowed by law, and for the filing of an amendment to such articles, five dollars (\$5.00) and his fees allowed by law: Provided, that when the authorized capital stock of such corporations shall be less than one thousand dollars (\$1,000), such fee for filing either the articles of incorporation or amendments thereto shall be two dollars (\$2.00). (1915, c. 144, s. 4; C.S., s. 5246; 1967, c. 823, s. 13.)

§ 54-116. Bylaws adopted.

At the time of making the articles of incorporation the incorporators shall make bylaws which shall provide:

- (1) The name of the corporation.
- (2) The purposes for which it is formed.
- (3) Qualifications for membership.
- (4) The date of the annual meeting; the manner in which members shall be notified of meetings; the manner of conducting the meetings; the number of members which shall constitute a quorum at the meetings, and regulations as to voting.
- (5) The number of members of the board of directors; powers and duties; the compensation and duties of officers elected by the board of directors.
- (6) In the case of selling agencies or productive societies, regulations for grading.
- (7) In the case of selling agencies or productive societies, regulations governing the sale of products by the members through the organization.

- (8) The par value of the shares of capital stock.
- (9) The conditions upon which shares may be issued, paid in, transferred, and withdrawn.
- (10) The manner in which the reserve fund shall be accumulated.
- (11) The manner in which the dividends shall be determined and paid to members.
- (12) Associations, societies, companies or exchanges, organized hereunder to engage in the telephone or electric light business upon a mutual basis, shall adopt a bylaw limiting the patrons and subscribers to members of the association.
- (13) In the case of apartment housing, regulations governing the rental of apartments. (1915, c. 144, s. 5; C.S., s. 5247; 1925, c. 179, s. 4; 1959, c. 991.)

§ 54-117. General corporation law applied; dealing in products of, or renting to, nonmembers.

All mutual associations shall be maintained in accordance with the general corporation law, except as otherwise provided for in this Subchapter. And no corporation or association hereafter organized under this Subchapter for doing business in this State shall be permitted to deal in the products of nonmembers to an amount greater in value than such as are handled by it for members: Provided, no housing corporation or association hereafter organized under this Subchapter shall be permitted to rent to nonmembers for a period longer than 90 days. (1915, c. 144, s. 17; C.S., s. 5248; 1925, c. 179, s. 1; 1931, c. 447, s. 2; 1949, c. 1042, s. 2(b).)

CASE NOTES

This section does not convert a cooperative association into a general corporation, does not destroy the identity of the cooperative, and does not destroy the relationship between the tenant-shareholder and the owner-

cooperative, which is based primarily on the long-term proprietary lease rather than the corporate stock. *Sanders v. Tropicana*, 31 N.C. App. 276, 229 S.E.2d 304 (1976).

§ 54-118. Other corporations admitted.

All mutual corporations, companies, or associations heretofore organized and doing business under prior statutes, or which have attempted to so organize and do business, shall have the benefit of all of the provisions of this Subchapter, and be bound thereby on filing with the Secretary of State a written declaration, signed and sworn to by the president and secretary, to the effect that the mutual company or association has by a majority vote of its shareholders decided to accept the benefits of and to be bound by the provisions of this Subchapter. No association organized under this Subchapter shall be required to do or perform anything not specifically required herein, in order to become a corporation. (1915, c. 144, s. 16; C.S., s. 5249; 1925, c. 179, s. 1.)

§ 54-118.1. License taxes.

On and after June 1, 1955, the provisions of Article 2, Subchapter I of Chapter 105 of the General Statutes of North Carolina shall apply to an association or corporation organized under the provisions of this Subchapter. (1955, c. 1313, s. 1.)

§ 54-118.2. Franchise taxes.

On and after July 1, 1955, the provisions of Article 3, Subchapter I of Chapter 105 of the General Statutes of North Carolina shall apply to an association or corporation organized under the provisions of this Subchapter. (1955, c. 1313, s. 1.)

ARTICLE 17.***Stockholders and Officers.*****§ 54-119. Certificate for stock fully paid.**

Certificates of stock shall not be issued to any subscriber until fully paid, but the bylaws of the association may allow subscribers to vote as shareholders: Provided, part of the stock subscribed for has been paid in cash. (1915, c. 144, s. 11; C.S., s. 5250.)

§ 54-120. Ownership of shares limited.

No shareholder in any such association shall own shares of a greater aggregate par value than twenty percent (20%) of the paid-in capital stock, except as hereinafter provided, or be entitled to more than one vote. A mutual association shall reserve the right of purchasing the stock of any member whose stock is for sale, and may restrict the transfer of stock to such persons as are made eligible to membership in the bylaws. (1915, c. 144, s. 9; C.S., s. 5251; 1925, c. 179, s. 1.)

CASE NOTES

Directors' Authority to Enforce Transfer Restrictions. — There is no applicable general corporation law which would supplant the authority of a cooperative apartment association's board of directors in the enforcement of

the transfer restrictions contained in a proprietary lease and authorized by this section. *Sanders v. Tropicana*, 31 N.C. App. 276, 229 S.E.2d 304 (1976).

§ 54-121. Shares issued on purchase of business.

Whenever an association, created under this Subchapter, shall purchase the business of another association or person, it may pay for the same in whole or in part by issuing to the selling association or persons shares of its capital stock to an amount which at par value would equal the fair market value of the business so purchased, and in such case the transfer to the association of such business at such valuation shall be equivalent to payment in cash for the shares of stock so issued. (1915, c. 144, s. 10; C.S., s. 5252.)

§ 54-122. Absent members voting.

At any regularly called general or special meeting of the shareholders a written vote received by mail from any absent shareholder, and signed by him, may be read in such meeting, and shall be equivalent to a vote of such of the shareholders so signing: Provided, he has been previously notified in writing of the exact motion or resolution upon which such vote is taken, and a copy of same is forwarded with and attached to the vote so mailed by him. In case of sickness or other unavoidable absence of a member, he shall be allowed to vote

by proxy in writing; but no member shall vote more than one such proxy. (1915, c. 144, s. 12; C.S., s. 5253.)

§ 54-123. Directors and other officers.

Every such association shall be managed by a board of not less than five directors. The directors shall be elected by and from the stockholders of the association at such time and for such term of office as the bylaws may prescribe, and shall hold office for the time for which elected and until their successors are elected and shall enter upon the discharge of such duties as are prescribed in the bylaws; but a majority of the stockholders shall have the power at any regular or special stockholders' meeting, legally called, to remove any director or officer for cause, and fill the vacancy, and thereupon the director or officer so removed shall cease to be a director or officer of the association. The officers of every such association shall be a president, one or more vice-presidents, a secretary and treasurer, who shall be elected annually by the directors, and each of the officers must be a director of the association. The office of secretary and treasurer may be combined, and when so combined the person filling the office shall be secretary-treasurer. (1915, c. 144, s. 6; C.S., s. 5254.)

ARTICLE 18.

Powers and Duties.

§ 54-124. Nature of business authorized.

An association created under this Subchapter shall have power to conduct any agricultural, housing, horticultural, forestry, dairy, mercantile, mining, manufacturing, telephone, electric light, power, storage, refrigeration, flume, irrigation, water, sewerage, or mechanical business, or purchase, maintain and use fire-fighting equipment, on the mutual plan. (1915, c. 144, s. 8; C.S., s. 5255; 1925, c. 179, ss. 1, 3; 1949, c. 1042, s. 2; 1955, c. 746, s. 2.)

§ 54-125. Amendment of articles.

The association may amend its articles of incorporation by a majority vote of its shareholders at any regular shareholders' meeting, or any special shareholders' meeting called for that purpose, on 10 days' notice to the shareholders. The power to amend shall include the power to increase or diminish the amount of capital stock and the number of shares: Provided, the amount of the capital stock shall not be diminished below the amount of the paid-up capital at the time the amendment is adopted. Within 30 days after the adoption of an amendment to its articles of incorporation, an association shall cause a copy of such amendment adopted to be recorded in the office of the Secretary of State and of the register of deeds of the county where the principal place of business is located. (1915, c. 144, s. 7; C.S., s. 5256; 1967, c. 823, s. 14.)

§ 54-126. Apportionment of earnings.

The directors, subject to revision by the association at any general or special meeting, shall apportion the earnings by first paying dividends on the paid-up capital stock, not exceeding six percent (6%) per annum, then setting aside not less than ten percent (10%) of the net profits for a reserve fund, until an amount has been accumulated in the reserve fund equal to thirty percent (30%) of the paid-up capital stock, and not less than two percent (2%) thereof for an educational fund to be used in teaching cooperation, and the remainder of the net

profits by uniform dividend upon the amount of purchases of shareholders and upon the wages and salaries of employees, and one half of such uniform dividend to nonshareholders on the amount of their purchase, which may be credited to the account of such nonshareholders on account of capital stock of the association; but in selling agencies such as fruit, truck, peanuts, and cotton growers' associations, and in productive associations such as creameries, canneries, warehouses, factories, and the like, dividends shall be prorated on raw materials delivered instead of on goods purchased. In case the association is both a selling and productive concern, or a service and distributing association the dividends may be on both raw material delivered and on goods or service purchased by patrons. (1915, c. 144, s. 13; C.S., s. 5257; 1925, c. 179, s. 5.)

§ 54-127. Time of distribution.

The profits or net earnings of such association shall be distributed to those entitled thereto, at such times as the bylaws shall prescribe, which shall be as often as once in 12 months. (1915, c. 144, s. 14; C.S., s. 5258.)

§ 54-128. Annual reports.

Every association organized under the provisions of this Subchapter shall annually, on or before the first day of March of each year, make a report to the Secretary of State; such report shall contain the name of the company, its principal place of business in this State, and generally a statement as to its business, showing total amount of business transacted, amount of capital stock subscribed for and paid in, number of shareholders, total expenses of operation, amount of indebtedness or liabilities, and its profits and losses. A copy of such report shall also be filed with the division of markets in the Department of Agriculture. (1915, c. 144, s. 15; C.S., s. 5259.)

SUBCHAPTER V. MARKETING ASSOCIATIONS.

ARTICLE 19.

Purpose and Organization.

§ 54-129. Declaration of policy.

In order to promote, foster, and encourage the intelligent and orderly producing and marketing of agricultural products through cooperation, and to eliminate speculation and waste, and to make the distribution of agricultural products as direct as can be efficiently done between producer and consumer, and to stabilize the marketing problems of agricultural products, this Subchapter is enacted. (1921, c. 87, s. 1; C.S., s. 5259(a); 1935, c. 230, s. 1.)

Legal Periodicals. — For discussion of cooperative marketing, see 1 N.C.L. Rev. 216, and 2 N.C.L. Rev. 222.

CASE NOTES

This Subchapter is valid. — Tobacco Growers Coop. Ass'n v. Jones, 185 N.C. 265, 117 S.E. 174 (1923); Tobacco Growers Coop. Ass'n v. Bissett, 187 N.C. 180, 121 S.E. 446 (1924); Tobacco Growers Coop. Ass'n v. Patterson, 187 N.C. 252, 121 S.E. 631 (1924); Tobacco Growers Coop. Ass'n v. Battle, 187 N.C. 260, 121 S.E. 629 (1924).

Collateral Attack on Validity of Organization. — The validity of the association cannot be assailed by alleging an insufficient number of signers. This is a collateral attack

and is not a direct attack by the State upon a quo warranto to vitiate the incorporation. Pittman v. Tobacco Growers Coop. Ass'n, 187 N.C. 340, 121 S.E. 634 (1924).

Withdrawal of Charter. — Where an association formed under this Subchapter has no capital, stock, surplus or credit except as given by the statute, the legislature may withdraw its charter at any time. Tobacco Growers Coop. Ass'n v. Jones, 185 N.C. 265, 117 S.E. 174 (1923).

§ 54-130. Definitions and nature.

As used in this Subchapter—

- (1) Agricultural Products. — The term "agricultural products" shall include horticultural, viticultural, forestry, dairy, livestock, poultry, bee, and any farm products.
- (2) Association. — The term "association" means
 - a. Any corporation organized under this Subchapter; or
 - b. Any foreign corporation which
 1. Is organized under any general or special act of another state or the District of Columbia as a cooperative association for the mutual benefit of its members and other patrons,
 2. Confines its operations in this State to the purposes specified in, and restricts the return on the stock or membership capital and the amount of its business with nonmembers to the limits placed thereon by, this Subchapter for corporations organized hereunder, and
 3. Is authorized to transact business in this State pursuant to G.S. 54-139.
- (3) Charter. — The term "charter" includes the original articles of incorporation, together with all amendments thereto and articles of merger or consolidation.
- (4) Member. — The term "member" shall include actual members of associations without capital stock and holders of stock in associations organized with capital stock.
- (5) Person. — The term "person" shall include individuals, firms, partnerships, corporations, and associations.

Associations organized or domesticated hereunder shall be deemed nonprofit, inasmuch as they are not organized to make profits for themselves, as such, or for their members, as such, but only for their members as producers.

This Subchapter shall be referred to as the "Cooperative Marketing Act." (1921, c. 87, s. 2; C.S., s. 5259(b); 1935, c. 436, s. 1; 1963, c. 1168, ss. 1-3.)

§ 54-131. Who may organize.

Three or more persons engaged in the production of agricultural products may form a nonprofit, cooperative association, with or without capital stock, under the provisions of this Subchapter. (1921, c. 87, s. 3; C.S., s. 5259(c); 1979, c. 908, s. 1.)

§ 54-132. Purposes.

An association may be organized to engage in any activity in connection with the producing, marketing or selling of the agricultural products of its members and other farmers, or with the harvesting, preserving, drying, processing, canning, packing, storing, handling, shipping, or utilization thereof, of the manufacturing or marketing of the by-products thereof; or in connection with the manufacturing, selling, or supplying to its members of machinery, equipment, or supplies; or in the financing of the above-enumerated activities; or in any one or more of the activities specified herein. (1921, c. 87, s. 4; C.S., s. 5259(d); 1933, c. 350, s. 2; 1935, c. 230, s. 2.)

§ 54-133. Preliminary investigation.

Every group of persons contemplating the organization of an association under this Subchapter is urged to communicate with the Chief of the Division of Markets, who will inform it whatever a survey of the marketing conditions affecting the commodities to be handled by the proposed association indicates regarding probable success. (1921, c. 87, s. 5; C.S., s. 5259(e).)

§ 54-134. Articles of incorporation.

Each association formed under this Subchapter must prepare and file articles of incorporation, setting forth:

- (1) The name of the association.
- (2) The purposes for which it is formed.
- (3) The place where its principal business will be transacted.
- (4) The period of duration, which may be perpetual. When the articles of incorporation fail to state the period of duration, it shall be considered perpetual. Any association heretofore or hereafter organized for a period less than perpetual, may by amendment to its articles of incorporation, extend the period of its duration for a specified period or perpetually.
- (5) The names and addresses of those who are to serve as directors for the first term or until the election of their successors.
- (6) If organized without capital stock, whether the property rights and interest of each member shall be equal or unequal; and if unequal, the article shall set forth the general rule or rules applicable to all members by which the property rights and interests, respectively, of each member may and shall be determined and fixed; and this association shall have the power to admit new members who shall be entitled to share in the property of the association with the old members in accordance with such general rule or rules. This provision of the articles of incorporation shall not be altered, amended, or repealed except by the written consent or the vote of three-fourths of the members.
- (7) If organized with capital stock, the amount of such stock and the number of such shares into which it is divided and the par value thereof. The capital stock may be divided into preferred and common stock. If so divided, the articles of incorporation must contain a statement of the number of shares of stock to which preference is granted and the number of shares of stock to which no preference is granted and the nature and extent of the preference and the privileges granted to each.

In addition to the foregoing, the petition for articles of incorporation may contain any provision consistent with law with respect to management, regulation, government, financing, indebtedness, membership, the establishment

of voting districts and the election of delegates for representative purposes, the issuance, retirement and transfer of its stock, if formed with capital stock, or any provisions relative to the way or manner in which it shall operate with respect to its members, officers, or directors, and any other provisions relating to its affairs; provided that nothing set forth in this paragraph shall be construed as limiting any of the rights or powers otherwise given to such associations.

The articles must be subscribed by the incorporators and acknowledged by one of them before an officer authorized by the law of this State to take and certify acknowledgments of deeds and conveyances; and shall be filed as provided in G.S. 55A-4; and when so filed the said articles of incorporation, or certified copies thereof, shall be received in all the courts of this State, and other places, as prima facie evidence of the facts contained therein, and of the due incorporation of such association. A certified copy of the articles of incorporation shall also be filed with the Chief of the Division of Markets. (1921, c. 87, s. 8; C.S., s. 5259(f); 1935, c. 230, ss. 3, 4; 1963, c. 1168, ss. 4, 5; 1979, c. 908, s. 2.)

CASE NOTES

When Agreement Becomes Binding. — The agreement to form an association under this Subchapter becomes binding at once upon its being accepted by the association after incorporation. *Tobacco Growers Coop. Ass'n v. Jones*, 185 N.C. 265, 117 S.E. 174 (1923).

§ 54-135. Amendments to articles of incorporation.

(a) An association may amend its charter from time to time in any and as many respects as may be desired, so long as its charter as amended contains only such provisions as are lawful under this Subchapter.

(b) Amendments to the charter shall be made as follows: The board of directors shall by a vote of not less than two-thirds of all of the members of the board, adopt a resolution approving the proposed amendment or amendments and directing that the proposed amendment or amendments be submitted to a vote at a meeting of members, which may be either an annual or a special meeting. Written or printed notice setting forth the proposed amendment or amendments, or a summary of the changes to be effected thereby shall be given to each member entitled to vote at such meeting, within the time and in the manner provided in this Subchapter for the giving of notice of meetings of members. The proposed amendment shall be adopted upon receiving at least a majority of the votes entitled to be cast by members present or represented by proxy at such meeting.

(c) The articles of amendment shall set forth:

- (1) The name of the association;
- (2) The amendment or amendments so adopted;
- (3) A statement setting forth the date of the meeting of the board of directors at which the amendment or amendments were approved by the board, that a quorum was present at such meeting, and that such approval received a vote of not less than two-thirds of all the members of the board;
- (4) A statement setting forth the date of the meeting of members at which the amendment was adopted, that a quorum was present at such meeting, and that such amendment received at least a majority of the votes entitled to be cast by members present or represented by proxy at such meeting;

- (5) The articles of amendment shall be executed by the association and shall be filed all as provided in G.S. 55A-4;
- (6) A certified copy of the articles of amendment shall be filed with the Chief of the Division of Markets. (1921, c. 87, s. 9; C.S., s. 5259(g); 1935, c. 230, s. 5; 1963, c. 1168, s. 6.)

§ 54-136. Bylaws.

Each association incorporated under this Subchapter must, within 30 days after its incorporation, adopt for its government and management a code of bylaws, not inconsistent with the powers granted by this Subchapter. A majority vote of a quorum of the members or stockholders attending a meeting, of which notice of the proposed bylaw or bylaws shall have been given, is sufficient to adopt or amend the bylaws. Each association under its bylaws may also provide for any or all of the following matters:

- (1) The time, place, and manner of calling and conducting its meetings.
- (2) The number of stockholders or members constituting a quorum.
- (3) The right of members or stockholders to vote by proxy or by mail, or by both, and the conditions, manner, form, and effects of such votes.
- (4) The number of directors constituting a quorum.
- (5) The qualifications, compensations, and duties and terms of office of directors and officers; time of their election, and the mode and manner of giving notice thereof.
- (6) Penalties for violations of the bylaws.
- (7) The amount of entrance, organization, and membership fees, if any; the manner and method of collection of the same, and the purposes for which they may be used.
- (8) The amount which each member or stockholder shall be required to pay annually or from time to time, if at all, to carry on the business of the association, the charge, if any, to be paid by each member or stockholder for services rendered by the association to him, and the time of payment and the manner of collection; and the marketing contract between the association and its members or stockholders which every member or stockholder may be required to sign.
- (9) The number and qualification of members or stockholders of the association and the conditions precedent to membership or ownership of common stock; the method, time, and manner of permitting members to withdraw or the holders of common stock to transfer their stock; the manner of assignment and transfer of the interest of members, and of the shares of common stock; the conditions upon which, and the time when membership of any member shall cease; the automatic suspension of the rights of a member when he ceases to be eligible to membership in the association, and mode, manner, and effect of the expulsion of a member; manner of determining the value of a member's interest and provision for its purchase by the association upon the death or withdrawal of a member or stockholder, or upon the expulsion of a member or forfeiture of his membership, or at the option of the association, by conclusive appraisal by the board of directors.

Upon the death, withdrawal or expulsion of a member, the board of directors of the association shall, within one year, cause to be paid to such member or his estate one hundred percent (100%) of all amounts due him for any and all raw products which have been delivered by him to the association. All other amounts which might be due for capital stock, certificates of interest, reserves or on account of any other equity credits shall be payable in accordance with the charter or bylaws of the association.

Notwithstanding the foregoing provisions of this section, any association may amend its articles of incorporation to provide that thereafter any bylaw

or bylaws of the association may be amended or repealed, or any new bylaw may be adopted, either by the members or by the board of directors, but if the members amend any bylaw or bylaws or adopt any new bylaw or bylaws, such bylaw or bylaws shall not thereafter be amended or repealed by the board of directors, and if the members repeal any bylaw or bylaws, such bylaw or bylaws shall not be readopted by the board of directors; provided, however, that no bylaw shall be adopted by the board of directors which shall require a higher number or percentage of members to be present or represented at a members' meeting for the purpose of constituting a quorum, or a higher number or percentage of such quorum to take action, than was the case before the power to alter, amend, or repeal the bylaws was conferred upon the board of directors. (1921, c. 87, s. 10; C.S., s. 5259(h); 1935, c. 230, s. 6; 1963, c. 1168, s. 7; 1979, c. 543.)

§ 54-137. General and special meetings; how called.

In its bylaws each association shall provide for one or more regular meetings annually. The board of directors shall have the right to call a special meeting at any time, and ten percent (10%) of the members or stockholders may file a petition stating the specific business to be brought before the association, and demand a special meeting at any time. Such meeting must thereupon be called by the directors. Notice of all meetings, together with a statement of the purposes thereof, shall be mailed to each member at least 10 days prior to the meeting: Provided, however, that the bylaws may require instead that such notice may be given by publication in a newspaper of general circulation, published at the principal place of business of the association. (1921, c. 87, s. 11; C.S., s. 5259(i).)

§ 54-138. Conflicting laws not to apply.

Any provisions of law which are in conflict with this Subchapter shall not be construed as applying to the associations herein provided for. (1921, c. 87, s. 20; C.S., s. 5259(j).)

§ 54-139. Domestication of foreign cooperative corporations; limitation on use of word "cooperative."

(a) A foreign corporation that can qualify as an association, as defined in G.S. 54-130(2)b1 and 2, may, under the provisions of Article 8, Chapter 55A, if it be a nonstock corporation, or under the provisions of Article 10, Chapter 55, if it be a stock corporation, be authorized to transact business in this State.

(b) No person other than an association organized under this Subchapter, or a foreign corporation domesticated pursuant to subsection (a) of this section, or an electric or telephone membership corporation domesticated pursuant to G.S. 117-28, shall be entitled to organize, domesticate, or transact business in this State if the corporate or other business name or title of such person contains the word "cooperative." (1921, c. 87, s. 21; C.S., s. 5259(k); 1963, c. 1168, s. 8.)

§ 54-140. Association heretofore organized may adopt the provisions of this Subchapter.

Any corporation or association organized under previously existing statutes may, by a majority vote of its stockholders or members, be brought under the provisions of this Subchapter by limiting its membership and adopting the other restrictions as provided herein. It shall make out in duplicate a statement signed and sworn to by its directors, upon forms supplied by the Secretary of

State, to the effect that the corporation or association has by a majority vote of its stockholders or members decided to accept the benefits and be found by the provisions of this Subchapter. Articles of incorporation shall be filed as required in G.S. 54-134, except that they shall be signed by the members of the board of directors. The filing fee shall be the same as for filing an amendment to articles of incorporation. (1921, c. 87, s. 24; C.S., s. 5259(1).)

Cross References. — As to fee for filing amendment to articles of incorporation, see § 54-144.

§ 54-141. Associations not in restraint of trade.

No association organized hereunder shall be deemed to be a combination in restraint of trade or an illegal monopoly; or an attempt to lessen competition or fix prices arbitrarily, nor shall the marketing contracts or agreements between the association and its members, or any agreements authorized in this Subchapter be considered illegal or in restraint of trade. (1921, c. 87, s. 26; C.S., s. 5259(m).)

CASE NOTES

Purpose, Effect and Validity. — This Subchapter is an enabling act whereby an organization among tobacco growers may be formed by the voluntary act of those joining therein for handling the product of its members; and the statute, and the organization formed in pursuance thereof, are not objectionable as being in restraint of interstate commerce, or contrary to the law against monopolies or the public policy or Constitution of this State. *Tobacco Growers Coop. Ass'n v. Jones*, 185 N.C. 265, 117 S.E. 174 (1923).

Legal presumption is in favor of validity of the marketing contract made by a member with a cooperative association, in an action by the latter against the former for its breach, which presumption will only yield when its

illegal character plainly appears; and in this case there is nothing appearing that would indicate the association proposed to sell the member's tobacco for a greater sum than its true or actual value, or that it was acting in violation of the anti-trust law, or in restraint of trade. *Tobacco Growers Coop. Ass'n v. Jones*, 185 N.C. 265, 117 S.E. 174 (1923).

Governmental Control to Prevent Restraint of Trade. — The governmental control to be exercised as herein prescribed renders the cooperative plan for the protection of its own members incapable of exercise to the extent of a monopoly or restraint of trade prohibited by law. *Tobacco Growers Coop. Ass'n v. Jones*, 185 N.C. 265, 117 S.E. 174 (1923).

§ 54-142. Application of Business Corporation Act to cooperative associations with capital stock.

The provisions of the Business Corporation Act (Chapter 55 of the General Statutes) shall apply, so far as appropriate, to every cooperative association with capital stock heretofore or hereafter organized or domesticated under this Subchapter, except where the provisions of that act are in conflict with or inconsistent with the express provisions of this Subchapter. (1921, c. 87, s. 28; C.S., s. 5259(o); 1963, c. 1168, s. 9.)

CASE NOTES

Effect of Period Limiting Existence. — A charter provision that a cooperative marketing association shall exist for five years does not contemplate that the association shall hold over

the crops raised in one year for one or more successive years. *Tobacco Growers Coop. Ass'n v. Jones*, 185 N.C. 265, 117 S.E. 174 (1923).

§ 54-142.1. Application of Nonprofit Corporation Act to cooperative associations without capital stock.

The provisions of the Nonprofit Corporation Act (Chapter 55A of the General Statutes) shall apply, so far as appropriate, to every cooperative association without capital stock heretofore or hereafter organized or domesticated under this Subchapter, except where the provisions of that act are in conflict with or inconsistent with the express provisions of this Subchapter. (1963, c. 1168, s. 9.)

§ 54-143. License taxes.

On and after June 1, 1955, the provisions of Article 2, Subchapter I of Chapter 105 of the General Statutes of North Carolina shall apply to an association or corporation organized under the provisions of this Subchapter. (1921, c. 87, s. 29; C.S., s. 5259(p); 1955, c. 1313, s. 1.)

§ 54-143.1. Franchise taxes.

On and after July 1, 1955, the provisions of Article 3, Subchapter I of Chapter 105 of the General Statutes of North Carolina shall apply to an association or corporation organized under the provisions of this Subchapter. (1955, c. 1313, s. 1.)

§ 54-144. Filing fees.

For filing articles of incorporation, an association organized hereunder shall pay ten dollars (\$10.00); and for filing an amendment to the articles, two and one-half dollars (\$2.50). (1921, c. 87, s. 30; C.S., s. 5259(q).)

ARTICLE 20.

Members and Officers.

§ 54-145. Members.

(a) Under the terms and conditions prescribed in its bylaws, an association may admit as members, or issue common stock, only to persons engaged in the production of agricultural products, including the lessees and tenants of land used for the production of such products and any lessors and landlords who receive as rent part of the crop raised on the leased premises.

(b) If a member of a nonstock association be other than a natural person, such member may be represented by any individual, associate, officer, or member thereof, duly authorized in writing.

(c) One association organized hereunder may become a member or stockholder of any other association or associations, organized hereunder. (1921, c. 87, s. 7; C.S., s. 5259(r); 1963, c. 1168, s. 10.)

§ 54-146. Directors; election.

(a) The affairs of the association shall be managed by a board of not less than three directors, elected by the members or stockholders from their own number. The bylaws may provide that the territory in which the association has members shall be divided into districts, and that the directors shall be elected according to such districts. In such case the bylaws shall specify the number of directors to be elected by each district, the manner and method of

reapportioning the directors and of redistricting the territory covered by the association. The bylaws may provide that primary elections should be held in each district to elect the directors apportioned to such districts, and the result of all such primary elections must be ratified by the next regular meeting of the association.

(b) The bylaws may provide that one or more directors may be appointed either by the Director of the Agricultural Extension Service or by such public official or public board or commission as may be designated by the bylaws. The directors so appointed need not be members or stockholders of the association, but shall have the same powers and rights as other directors.

(c) An association may provide a fair remuneration for the time actually spent by its officers and directors in its service. No director, during the term of his office, shall be a party to a contract for profit with the association differing in any way from the business relations accorded regular members or holders of common stock of the association, or to any other kind of contract differing from terms generally current in that district.

(d) When a vacancy on the board of directors occurs, other than by expiration of term, the remaining members of the board, by a majority vote, shall fill the vacancy, unless the bylaws provide for an election of directors by districts. In such case the board of directors shall immediately call a special meeting of the members or stockholders in that district to fill the vacancy: Provided, that this subsection shall not apply to the director or directors appointed under the provisions of subsection (b) of this section: Provided further, that any vacancy occurring in the office of a director appointed under subsection (b) of this section shall be filled in the same manner as the original appointment was made. (1921, c. 87, s. 12; C.S., s. 5259(s); 1963, c. 1168, s. 11; 1979, c. 908, s. 3.)

§ 54-147. Election of officers.

The directors shall elect a president, one or more vice-presidents, a secretary and treasurer who need not be directors, and they may combine the offices of secretary and treasurer designating the combined office as secretary-treasurer. They shall elect from their number a chairman and vice-chairman unless the president and vice-presidents are members of the board. The board may elect or appoint such additional officers as are necessary and appropriate. The treasurer may be a bank or any depository, and as such shall not be considered an officer, but as a function of the board of directors. In such a case the secretary shall perform the usual accounting duties of the treasurer, excepting that the funds shall be deposited only as authorized by the board of directors. (1921, c. 87, s. 13; C.S., s. 5259(t); 1971, c. 925.)

§ 54-148. Stock; membership certificates; when issued; voting; liability; limitation on transfer of ownership.

(a) When a member of an association established without capital stock has paid his membership fee in full, he shall receive a certificate of membership.

(b) No association shall issue stock to a member until it has been fully paid for. The promissory notes of the members may be accepted by the association as full or partial payment. The association shall hold the stock as security for the payment of the note, but such retention as security shall not affect the members' right to vote.

(c) Except for debts lawfully contracted between him and the association, no member shall be liable for the debts of the association to an amount exceeding the sum remaining unpaid on his membership fee or his subscription to the

capital stock, including any unpaid balance on any promissory notes given in payment thereof.

(d) A cooperative association, incorporated under this Subchapter, may fix or limit in its bylaws the amount of stock which one member might own in said association.

(e) No member or stockholder shall be entitled to more than one vote; provided, however, that any association organized hereunder, all of whose members are other associations organized hereunder shall have power to determine by its bylaws the number of votes to which each member association shall be entitled and to provide for the appointment or election of delegates to cast such votes and to represent the member associations at all members' meetings.

(f) Any association organized with stock under this Subchapter may issue preferred stock, with or without the right to vote. Such stock may be redeemable or retirable by the association on such terms and conditions as may be provided for by the articles of incorporation and printed on the face of the certificate.

(g) The bylaws shall prohibit the transfer of the common stock of the association to persons not engaged in the production of agricultural products, and such restrictions must be printed upon every certificate of stock subject thereto.

(h) The association may at any time, except when the debts of the association exceed fifty percent (50%) of the assets thereof, buy in or purchase its common stock at book value thereof as conclusively determined by the board of directors, and pay for it in cash within one year thereafter. (1921, c. 87, s. 14; C.S., s. 5259(u); 1935, c. 436, s. 2; 1955, c. 596; 1963, c. 1168, s. 12.)

§ 54-149. Removal of officer or director.

Any member may bring charges against an officer or director by filing them in writing with the secretary of the association, together with a petition signed by ten percent (10%) of the members, requesting the removal of the officer or director in question. The removal shall be voted upon at the next regular or special meeting of the association, and by a vote of a majority of the members, the association may remove the officer or director and fill the vacancy. The director or officer against whom such charges have been brought shall be informed in writing of the charges previous to the meeting, and shall have an opportunity at the meeting to be heard in person or by counsel, and to present witnesses; and the person or persons bringing the charges against him shall have the same opportunity.

In case the bylaws provide for election of directors by districts, with primary elections in each district, then the petition for removal of a director must be signed by twenty percent (20%) of the members residing in the district from which he was elected. The board of directors must call a special meeting of the members residing in that district to consider the removal of the director. By a vote of the majority of that district, the director in question shall be removed from office: Provided, that this section shall not apply to directors appointed under subsection (b) of G.S. 54-146. (1921, c. 87, s. 15; C.S., s. 5259(v).)

§ 54-150. Referendum.

Upon demand of one third of the entire board of directors, any matter that has been approved or passed by the board must be referred to the entire membership of the stockholders for decision at the next special or regular meeting: Provided, however, that a special meeting may be called for the purpose. (1921, c. 87, s. 16; C.S., s. 5259(w).)

ARTICLE 21.

*Powers, Duties, and Liabilities.***§ 54-151. Powers.**

Each association incorporated under this Subchapter shall have the following powers:

- (1) To engage in any activity in connection with the producing, marketing, selling, harvesting, preserving, drying, processing, canning, packing, storing, handling, or utilization of any agricultural products produced or delivered to it by its members and other farmers; or the manufacturing or marketing of the by-products thereof; or in connection with the purchase, hiring, or use by its members of supplies, machinery, or equipment; or in the financing of any such activities; or in any one or more of the activities specified in this section. No such association, during any fiscal year thereof, shall deal in or handle products, machinery, equipment, supplies, and/or perform services for and on behalf of nonmembers to an amount greater in value than such as are dealt in, handled, and/or performed by it for and on behalf of members during the same period.
- (2) To borrow money and to make advances to members and other farmers who deliver agricultural products to the association.
- (3) To act as the agent or representative of any member or members in any of the above-mentioned activities.
- (4) To purchase or otherwise acquire, and to hold, own, and exercise all rights or ownership in, and to sell, transfer, or pledge shares of the capital stock or bonds of any corporation or association engaged in any related activity or in the handling or marketing of any of the products handled by the association, or engaged in the financing of the association.
- (5) To establish reserves and to invest the funds thereof in bonds or such other property as may be provided in the bylaws.
- (6) To buy, hold, and exercise all privileges of ownership, over such real or personal property as may be necessary or convenient for the conducting and operation of any of the business of the association, or incidental thereto.
- (7) To do each and everything necessary, suitable, or proper for the accomplishment of any one of the purposes or the attainment of any one or more of the objects herein enumerated; or conducive to or expedient for the interest or benefit of the association; and to contract accordingly; and in addition, to exercise and possess all powers, rights, and privileges necessary or incidental to the purposes for which the association is organized or to the activities in which it is engaged; and in addition, any other rights and powers, and privileges granted by the laws of this State to ordinary corporations, except such as are inconsistent with the express provisions of this Subchapter; and to do any such thing anywhere. (1921, c. 87, s. 6; C.S., s. 5259(x); 1933, c. 350, ss. 3, 4; 1935, c. 230, ss. 7-9.)

Cross References. — As to formation of subsidiary companies, see § 54-158 and note.

§ 54-152. Marketing contract.

(a) The association and its members may make and execute marketing contracts, requiring the members to sell, for any period of time, not over 10 years, all or any specified part of their agricultural products or specified commodities exclusively to or through the association or any facilities to be created by the association. The contract may provide that the association may sell or resell the products of its members, with or without taking title thereto, and pay over to its members the resale price, after deducting all necessary selling, overhead, and other costs and expenses, including dividends on preferred stock, not exceeding ten percent (10%) per annum, and reserve for retiring the stock, if any; and other proper reserves; and dividends not exceeding ten percent (10%) per annum upon common stock.

(b) The bylaws and the marketing contract may fix, as liquidated damages, specific sums to be paid by the member or stockholder to the association upon the breach by him of any provision of the marketing contract regarding the sale or delivery or withholding of products; and may further provide that the member will pay all costs, premiums for bonds, expenses and fees in case any action is brought upon the contract by the association; and any such provisions shall be valid and enforceable in the courts of this State.

(c) In the event of any such breach or threatened breach of such marketing contract by a member, the association shall be entitled to an injunction to prevent the further breach of the contract, and to a decree of specific performance thereof. Pending the adjudication of such an action, and upon filing a verified complaint showing the breach or threatened breach, and upon filing a sufficient bond, the association shall be entitled to a temporary restraining order and preliminary injunction against the member.

(d) In the event that a member of an association incorporated under this chapter shall have died; and that, at a time more than six months after his death, such cooperative corporation has in its hands moneys not in excess of one hundred dollars (\$100.00) which would have been distributable and payable to such member except for his death; and that there has been appointed no administrator of his estate or that the administration of his estate has been closed at such time; then such corporation, without making any publication of notice, may disburse such moneys (not in excess of one hundred dollars (\$100.00)) in the following order:

- (1) To the widow of the deceased if there is a widow,
- (2) To pay any unsatisfied claims for funeral expenses or reimburse any person for the payment thereof, and
- (3) To any adult person of the class of those nearest of kin to the deceased, for the benefit of all members of such class.

In making such disbursements the said corporation shall be responsible and liable only for the exercise of good faith and reasonable care and shall have no further responsibility or liability with respect to such moneys or their application or disbursement. (1921, c. 87, s. 17; C.S., s. 5259(y); 1959, c. 1174; 1979, 2nd Sess., c. 1302, ss. 1, 2.)

CASE NOTES

I. General Consideration.

II. Breach of Marketing Contract.

I. GENERAL CONSIDERATION.

Right of Member to Place Lien on Crop.

— A member of a cooperative association may place a mortgage or crop lien on his crop for the

current year for the purpose of enabling him to successfully cultivate and produce the same, where the contract between the parties clearly contemplates such a mortgage, and good policy

requires that such a privilege should never be withdrawn. *Tobacco Growers Coop. Ass'n v. Patterson*, 187 N.C. 252, 121 S.E. 631 (1924).

Rights of Lienholder Who Furnishes Supplies. — The mortgagee or lienholder for supplies furnished to an association member to produce his crop has a right to demand and receive of the member, or to enforce delivery by any appropriate procedure, a sufficient amount of the crop or other property included in his mortgage, to satisfy his claims to the extent that the same constitute a valid lien superior to the rights and interests of the association under its contract. If such a lien and the amount and extent of it cannot be agreed upon and adjusted it would seem that the lien claimant should become or be made a party of record, that authoritative and final disposition should be made of the matter. *Tobacco Growers Coop. Ass'n v. Patterson*, 187 N.C. 252, 121 S.E. 631 (1924).

Liability of Member for Act of Nonmember Tenant. — The member of a cooperative association is not liable for a penalty on account of the failure of his tenant to market tobacco through the association until and unless he receives the tenant's crop as payment for rent, etc. He is then liable for as much as is received. *Tobacco Growers Coop. Ass'n v. Bissett*, 187 N.C. 180, 121 S.E. 446 (1924).

Validity of Tobacco Growers' Contract. — The provisions of the standard contract made by the Tobacco Growers Cooperative Association, formed under the provisions of this Subchapter, whereby a member agreed to sell and deliver to it all of the tobacco owned and produced by or for him or acquired by him as landlord or lessor during certain years, were valid and enforceable. *Tobacco Growers Coop. Ass'n v. Jones*, 185 N.C. 265, 117 S.E. 174 (1923); *Tobacco Growers Coop. Ass'n v. Patterson*, 187 N.C. 252, 121 S.E. 631 (1924); *Tobacco Growers Coop. Ass'n v. Battle*, 187 N.C. 260, 121 S.E. 629 (1924).

Avoiding Contract for Fraud. — In order to render void for fraud in its procurement a tobacco marketing contract made in conformity with the provisions of this section, it is required that the member seeking to do so must introduce evidence of the fraud he relies on, as well as allege it. *Tobacco Growers Coop. Ass'n v. Chilton*, 190 N.C. 602, 130 S.E. 312 (1925); *Simpson v. Tobacco Growers Coop. Ass'n*, 190 N.C. 603, 130 S.E. 507 (1925).

In order to avoid a written contract, made under this section, for fraudulent misrepresentations of the association's agent, it must not only be shown that the statements complained of were false, but that the plaintiff was at the time ignorant of their falsity and relied thereon to his damage, and he must show facts sufficient to make out a case of fraud with

all the material elements required in such instances. *Simpson v. Tobacco Growers Coop. Ass'n*, 190 N.C. 603, 130 S.E. 507 (1925).

Where an agent of a cooperative association falsely represents to a prospective member certain material advantages that induce him to sign the membership contract, without affording him, an illiterate man, an opportunity to become informed as to its contents, and he, within a reasonable time afterwards, is informed of this misrepresentation, and requests the agent to take his name off the books as a member and cancel the contract, the law will avoid the contract for the fraud. The cases in which the representations were only promissory in character, not amounting to a factual representation, do not apply. *Dunbar v. Tobacco Growers Coop. Ass'n*, 190 N.C. 608, 130 S.E. 505 (1925).

II. BREACH OF MARKETING CONTRACT.

Remedies for Breach of Contract by Member. — Upon the breach by a member of a cooperative association of a contract for the sole handling of his crop by the association, the recovery of liquidated damages and costs, and equitable relief by injunction to prevent the further breach of the contract, and a decree of specific performance, can be had, and also pending the adjudication of such actions, a temporary restraining order may be had against the member upon the filing of a verified complaint showing the breach of the contract, with the filing of sufficient bond. *Tobacco Growers Coop. Ass'n v. Jones*, 185 N.C. 265, 117 S.E. 174 (1923).

Liquidated Damages. — The fact that a cooperative marketing contract provides for liquidated damages does not give the association an adequate remedy at law against the members selling their tobacco otherwise than as provided in the marketing contract. *Tobacco Growers Coop. Ass'n v. Pollock*, 187 N.C. 409, 121 S.E. 763 (1924).

Specific Performance. — Injuries from the breach of marketing contract by a member with the Tobacco Growers Cooperative Association, formed under the provisions of this Subchapter, cannot be adequately compensated for in damages, and the equitable remedy of specific performance as allowed by this section will be upheld by the courts. *Tobacco Growers Coop. Ass'n v. Battle*, 187 N.C. 260, 121 S.E. 629 (1924).

Injunctive Relief. — Upon an alleged breach of a cooperative marketing contract on the part of a member, the equitable remedy by injunction is available to the association. *Tobacco Growers Coop. Ass'n v. Patterson*, 187 N.C. 252, 121 S.E. 631 (1924).

Continuation of Injunction to Final Hearing. — The right given to injunctive relief

against a member breaching his contract, upon filing the bond and verified complaint showing such breach, or threatened breach, relates only to the initial process and does not, and is not, intended to withdraw from the courts their constitutional right to pass upon the question of continuing the injunction to the final hearing upon the issues, under approved principles of law and equity. *Tobacco Growers Coop. Ass'n v. Bland*, 187 N.C. 356, 121 S.E. 636 (1924).

Where defendant member has admitted breaching his contract with the association, and avows that he expects to continue doing so, a temporary injunction should be continued until the final hearing. *Tobacco Growers Coop. Ass'n v. Patterson*, 187 N.C. 252, 121 S.E. 631 (1924).

Where the defendant resists injunctive relief upon the ground that he had not become a member, and the plaintiff's evidence tends strongly to show to the contrary, the injunction should be continued to the hearing upon the principle that the plaintiff has established an apparent right to the relief sought, and that the writ is reasonably necessary to protect the property pending the inquiry. *Tobacco Growers Coop. Ass'n v. Battle*, 187 N.C. 260, 121 S.E. 629 (1924); *Tobacco Growers Coop. Ass'n v. Spikes*, 187 N.C. 367, 121 S.E. 636 (1924).

Defenses to Continuance of Restraining Order. — The general denial by a cooperative marketing association of owing defendant member anything under the contract, without detailed statement as to the account between them from information available to it, was insufficient against the defense to continuation of a restraining order that the defendant was forced to sell a small portion of crop to maintain his livelihood because of a failure of the association to pay for bulk of crop under contract. *Tobacco Growers Coop. Ass'n v. Bland*, 187 N.C. 356, 121 S.E. 636 (1924).

A preliminary order restraining a member of a cooperative association from disposing of the tobacco embraced in his contract in breach thereof will not be dissolved by reason of a defense set up by the member that the tobacco was the subject of a lien for supplies necessary for its cultivation. The restraining order should be continued to the hearing, safeguarding the rights of the mortgagee to be asserted by his appropriate action. *Tobacco Growers Coop. Ass'n v. Patterson*, 187 N.C. 252, 121 S.E. 631 (1924).

The temporary restraining order obtained under the provisions of this section will not be continued if the breach of the contract complained of was caused by the association's own default, or if the continuance of the temporary restraining order will work greater injury than its dissolution by the court. *Tobacco Growers Coop. Ass'n v. Bland*, 187 N.C. 356, 121 S.E. 636 (1924).

Effect of Lien on Right to Injunction. — The fact that the member of a cooperative association gave a lien on his crop for advancements does not invade the rights of the association under the marketing contract so as to require that an injunction against selling the crops should be continued until the final hearing. *Tobacco Growers Coop. Ass'n v. Harvey & Son Co.*, 189 N.C. 494, 127 S.E. 545 (1925).

Justification for Breach Shown by Parol. — Where a member of a cooperative marketing association resists the performance of marketing his crop with the association under the usual and written contract, he may show by parol that he had never been a member thereof or obligated by the contract sued on, for the failure of the association to obtain a certain membership within the territory. *Tobacco Growers Coop. Ass'n v. Moss*, 187 N.C. 421, 121 S.E. 738 (1924).

Lack of Justification for Breach by Member. — A penalty in a small sum erroneously attempted to be imposed on a member by a marketing association, under its contract for the failure to market the crop of his nonmember tenant, is not of sufficient proportionate importance to justify an entire severance of the contract relation by the member thereof. *Tobacco Growers Coop. Ass'n v. Bland*, 187 N.C. 356, 121 S.E. 636 (1924).

Evasive Answer of Member Respecting Breach. — In proceedings for injunctive relief by a cooperative marketing association against a member wherein it definitely alleges that the defendant has breached his contract and declares his purpose to dispose of his tobacco in breach thereof, the defendant's answer not admitting the allegations, but demanding strict proof, is too evasive or illusive to be a denial of plaintiff's allegation, or received as sufficient evidence upon the question of injunctive relief. *Tobacco Growers Coop. Ass'n v. Patterson*, 187 N.C. 252, 121 S.E. 631 (1924).

§ 54-153. Purchasing business of other associations, persons, firms, or corporations; payment; stock issued.

Whenever an association organized hereunder with preferred capital stock shall purchase the stock or any property, or any interest in any property of any person, firm, or corporation or association, it may by agreement with the other

party or parties to the transaction discharge the obligations so incurred, wholly or in part, by exchanging for the acquired interest shares of its preferred capital stock to an amount which at par value would equal a fair market value of the stock or interest so purchased, as determined by the board of directors. In that case the transfer to the association of the stock or interest purchased shall be equivalent to payment in cash for shares of stock issued. (1921, c. 87, s. 18; C.S., s. 5259(z).)

§ 54-154. Annual reports.

Each association formed under this Subchapter shall prepare and make out an annual report on forms furnished by the Division of Markets, containing the name of the association, its principal place of business, and a general statement of its business operations during the fiscal year, showing the amount of capital stock paid up, and the number of stockholders of a stock association or the number of members and the amount of membership fees received, if a nonstock association; the total expenses of the operations; the amount of its indebtedness, or liability, and its balance sheets. (1921, c. 87, s. 19; C.S., s. 5259(aa).)

§ 54-155. Interest in other corporations or associations.

An association may organize, form, operate, own, control, have interest in, own stock of, or be a member of any other corporation or corporations, with or without capital stock, and engaged in preserving, drying, processing, canning, packing, storing, handling, shipping, utilizing, manufacturing, marketing, or selling of the agricultural products handled by the association, or the by-products thereof. If such corporations are warehousing corporations, they may issue legal warehouse receipts to the association, or to any other person, and such legal warehouse receipts shall be considered as adequate collateral to the extent of the current value of the commodity represented thereby. In case such warehouse is licensed or licensed and bonded under the laws of this State or the United States, its warehouse receipt shall not be challenged or discriminated against because of ownership or control, wholly or in part, by the association. (1921, c. 87, s. 22; C.S., s. 5259(bb).)

§ 54-156. Contracts and agreements with other associations.

Any association may, upon resolution adopted by its board of directors, enter into all necessary and proper contracts and agreements, and make all necessary and proper stipulations, agreements and contracts and arrangements with any other cooperative corporation, association, or associations, formed in this or in any other state, for the cooperative and more economical carrying on of its business, or any part or parts thereof. Any two or more associations may, by agreement between them, unite in employing and using or may separately employ and use the same methods, means, and agencies for carrying on and conducting their respective businesses. (1921, c. 87, s. 23; C.S., s. 5259(cc).)

§ 54-157. Breach of marketing contract of cooperative association; spreading false reports about the finances or management thereof; misdemeanor.

Any person or persons, or any corporation whose officers or employees knowingly induces or attempts to induce any member or stockholder of an association organized hereunder to breach his marketing contract with the association, or who maliciously and knowingly spreads false reports about the

finances or management thereof shall be guilty of a misdemeanor and subject to a fine of not less than one hundred dollars (\$100.00), and not more than one thousand dollars (\$1,000), for such offense and shall be liable to the association aggrieved in a civil suit in the penal sum of five hundred dollars (\$500.00) for each such offense: Provided, that this section shall not apply to a bona fide creditor of any member or stockholder of such association, or the agents or attorney of any such bona fide creditor, endeavoring to make collection of the indebtedness, or to any communication, written or oral, between a business company or concern and persons with whom it has an existing contractual relationship which communication relates to the performance of that contractual relationship and duties and responsibilities arising therefrom. (1921, c. 87, s. 25; C.S., s. 5259(dd); 1963, c. 1168, s. 14.)

CASE NOTES

Failure of Milk Processor to Deduct Dues from Payments to Producers. — Where a milk processor, purchasing directly from producers, deducts dues from its payments for milk so purchased and remits such dues to the producers' marketing association, but discontinues making such deductions pursuant to written

instructions of the producers and thereafter pays the producers in full for the milk purchased, the processor may not be held to have violated this section. *Carolina Milk Producers Coop. v. Melville Dairy, Inc.*, 225 N.C. 1, 120 S.E.2d 548 (1961).

§ 54-158. Cooperative associations may form subsidiaries.

Nothing in this Subchapter shall prevent an association organizing, forming, operating, owning, controlling, having an interest in, owning stock of, or being a member of any other corporation (hereinafter referred to as a subsidiary corporation) from including or having included in the charter or bylaws of such subsidiary corporation provisions for the control or management of said subsidiary corporation by such association to such extent as shall by votes of the board of directors of such association, and the majority of the stockholders of such subsidiary corporation, be declared to be for the best interests of said association and said subsidiary corporation respectively. Such provisions may be so included in any such charter or bylaws and may by way of illustration, but not of limitation, include the following:

- (1) Representation of said association on the board of directors or other governing body of said subsidiary corporation, upon such terms as may be deemed advisable.
- (2) Ownership by an association of an interest or interests in a subsidiary corporation represented by stock of any class thereof, or otherwise, to such extent and upon such terms, and with such voting power, as may be deemed advisable.
- (3) Participation by said association in the profits of such subsidiary corporation to such extent and upon such terms as shall be deemed advisable. (1933, c. 350, s. 1.)

CASE NOTES

Formation of Subsidiary Companies Prior to Enactment of Section. — That an organization of tobacco growers had formed subsidiary companies to cure tobacco, redry it, etc., was unobjectionable even prior to the

enactment of this section. *Tobacco Growers Coop. Ass'n v. Jones*, 185 N.C. 265, 117 S.E. 174 (1923) (decided prior to enactment of this section).

ARTICLE 22.

*Merger, Consolidation and Other Fundamental Changes.***§ 54-159. Procedure for merger.**

(a) Any two or more domestic associations organized under this Subchapter, either with or without capital stock, may merge into any one of such associations pursuant to a plan of merger approved in the manner provided in this Article.

(b) The board of directors of each association shall, by resolution adopted by each such board, approve a plan of merger setting forth:

- (1) The names of the association proposing to merge, and the name of the association into which they propose to merge, which is hereinafter designated as the surviving association.
- (2) The name which the surviving association is to have, which name may be that of any of the associations involved in the merger or any other available name, subject, however, to the limitations of G.S. 54-139 and 55A-10.
- (3) The terms and conditions of the proposed merger.
- (4) A statement of any changes in the charter of the surviving association to be effected by such merger.
- (5) Such other provisions not inconsistent with law as are deemed necessary or desirable. (1963, c. 1168, s. 13.)

§ 54-160. Procedure for consolidation.

(a) Any two or more domestic associations organized under this Subchapter, either with or without capital stock, may consolidate into a new association pursuant to a plan of consolidation approved in the manner provided in this Article.

(b) The board of directors of each association shall, by resolution adopted by each such board, approve a plan of consolidation setting forth:

- (1) The names of the associations proposing to consolidate, and the name of the new association into which they proposed to consolidate, which is hereinafter designated as the new association. The name of the new association may be that of any of the associations involved in the consolidation or any other available name, subject, however, to the limitations of G.S. 54-139 and 55A-10.
- (2) The terms and conditions of the proposed consolidation.
- (3) With respect to the new association, all of the appropriate statements required to be set forth in articles of incorporation for associations organized under this Subchapter.
- (4) Such other provisions not inconsistent with law as are deemed necessary or desirable. (1963, c. 1168, s. 13.)

§ 54-161. Approval of merger or consolidation; abandonment.

(a) A plan of merger or consolidation shall be adopted in the following manner: The board of directors of each merging or consolidating association shall adopt a resolution approving the proposed plan, and directing that it be submitted to a vote at a meeting of members having voting rights, which may be either an annual or a special meeting. Written or printed notice of the meeting shall be given to each member entitled to vote at such meeting. The notice shall state that the proposed plan of merger or consolidation will be considered and acted upon at the meeting, and a copy or a summary of the plan

of merger or plan of consolidation, as the case may be, shall be included in or enclosed with such notice. Such notice shall contain a statement, displayed with reasonable prominence, to the effect that objecting members are entitled, upon compliance with G.S. 54-166, including the 20-day demand requirement, to be paid the fair market value of their stock or other property rights or interest in the association, but failure of the notice to contain such a statement shall not invalidate the merger or consolidation. Each such notice shall be mailed by first-class mail at such a time that not less than 10 full days shall elapse between the date of mailing the notice and the date of the meeting, and shall be mailed to the member at his last address as it appears on the records of the association. The proposed plan shall be adopted upon receiving at least two-thirds of the votes entitled to be cast by members present at each such meeting where a quorum is present.

(b) After such approval, and at any time prior to the filing of the articles of merger or consolidation, the merger or consolidation may be abandoned pursuant to provisions therefor, if any, set forth in the plan of merger or consolidation. (1963, c. 1168, s. 13.)

§ 54-162. Articles of merger or consolidation.

(a) Upon such approval, articles of merger or articles of consolidation shall be executed by each association and filed as provided in G.S. 55A-4, except that a copy thereof certified by the Secretary of State shall also be recorded in the office of the register of deeds of each county wherein the constituent associations have their principal places of business or their registered offices.

(b) The articles of merger or consolidation shall set forth:

- (1) The plan of merger or the plan of consolidation; and
- (2) A statement setting forth the date of the meeting of the members of each association at which the plan was adopted, that a quorum was present at such meeting, and that such plan received at least two-thirds of the votes entitled to be cast by members present at each such meeting where a quorum was present.

(c) The time when the merger or consolidation is effected is determined by the provisions of G.S. 55A-4. (1963, c. 1168, s. 13; 1967, c. 823, s. 15.)

§ 54-163. Effect of merger or consolidation.

When such merger or consolidation has been effected:

- (1) The several associations, parties to the plan of merger or consolidation, shall be a single association which, in the case of a merger, shall be that association designated in the plan of merger as the surviving association, and, in the case of a consolidation, shall be the new association provided for in the plan of consolidation.
- (2) The separate existence of all associations which are parties to the plan of merger or consolidation, except the surviving or new association, shall cease.
- (3) Such surviving or new association shall have all the rights, privileges, immunities, and powers and shall be subject to all the duties and liabilities of an association organized under this Subchapter.
- (4) Such surviving or new association shall thereupon and thereafter, to the extent consistent with its charter as established or changed by the merger or consolidation, possess all the rights, privileges, immunities, and franchises, as well of a public as of a private nature, of each of the merging or consolidating associations; and all property, real and personal, and all debts due on any account, and all other choses in action, and all and every other interest, of or belonging to or due to each of the associations so merged or consolidated, shall be taken and

deemed to be transferred to and vested in such single association without further act or deed; and the title to any real estate, or any interest therein, vested in any of such associations shall not revert or be in any way impaired by reason of such merger or consolidation.

- (5) Such surviving or new association shall thenceforth be responsible and liable for all the liabilities, contracts or other obligations, and penalties of each of the associations so merged or consolidated; and any claim existing or action or proceeding, civil or criminal, pending by or against any of such associations may be prosecuted as if such merger or consolidation had not taken place, or such surviving or new association may be substituted in its place; and any judgments rendered against any of the merged or consolidated associations may be enforced against the surviving or new association. Neither the rights of creditors nor any liens upon the property of any merged or consolidated association shall be impaired by such merger or consolidation.
- (6) In the case of a merger, the charter of the surviving association shall be deemed to be amended to the extent, if any, that changes in its charter are stated in the plan of merger. In the case of a consolidation, the articles of consolidation shall be deemed to be the articles of incorporation of the new association. (1963, c. 1168, s. 13.)

§ 54-164. Merger or consolidation of domestic and foreign associations.

(a) One or more domestic associations organized under this Subchapter and one or more foreign corporations engaging in any activity such as is described in G.S. 54-132, and which is a nonprofit cooperative in the sense that the term "nonprofit" is used in G.S. 54-130, may be merged or consolidated into an association of this State or an association or corporation of another state if such merger or consolidation is permitted by the laws of the state under which each such foreign association or corporation is organized.

(b) Each domestic association shall comply with the provisions of this Article with respect to the merger or consolidation, as the case may be, of domestic associations, and each foreign association or corporation shall comply with the applicable provisions of the laws of the state under which it is organized.

(c) If the surviving or new association or corporation, as the case may be, is an association or corporation of any state other than this State, it shall comply with the provisions of this Subchapter with respect to foreign corporations if it is to transact business in this State; and if after the merger or consolidation it transacts no business in this State, the courts of this State shall have jurisdiction in actions to enforce any obligation of any constituent association of this State and process therein may be served as provided in G.S. 55-145.

(d) The effect of such merger or consolidation shall be the same as in the case of the merger or consolidation of domestic associations, if the surviving or new corporation is to be an association of this State. If the surviving or new association or corporation is to be an association or corporation of any state other than this State, the effect of such merger or consolidation shall be the same as in the case of the merger or consolidation of domestic associations except insofar as the laws of such other state provide otherwise.

(e) If the new or surviving association or corporation is not an association of this State, then notwithstanding anything in the foregoing provisions of this section:

- (1) The rights of any member of any constituent association that is an association of this State to receive notice of objectors' rights, to file his objection, upon such objection to demand and receive payment of the fair market value of his stock or other property rights or interests in

the association, or to avail himself of any equitable relief to which he would be entitled if the surviving or new association or corporation were an association of this State, shall not be impaired; and

- (2) The courts of this State shall have jurisdiction in actions to enforce the aforesaid rights against the surviving or new association or corporation regardless of whether or not said association or corporation is otherwise subject to the jurisdiction of the courts of this State and in any such action service of process may be made in the manner provided in G.S. 55-145 that would be applicable if said association or corporation were transacting business in this State. (1963, c. 1168, s. 13.)

§ 54-165. Sale, lease or exchange of assets; mortgage or pledge of assets.

(a) A sale, lease, or exchange of all, or substantially all, the property and assets of an association organized under the provisions of this Subchapter may be made upon such terms and conditions and for such consideration, which may consist in whole or in part of money or property, real or personal, including shares of any corporation for profit, domestic or foreign, as may be authorized in the following manner: The board of directors shall adopt a resolution recommending such sale, lease, or exchange and directing that it be submitted to a vote at a meeting of members, which may be either an annual or a special meeting. Written or printed notice of the meeting shall be given to each member entitled to vote at such meeting. The notice shall state that the proposed sale, lease, or exchange will be considered and acted upon at such meeting, and a statement of the terms of the proposed sale, lease, or exchange, as the case may be, shall be included in or enclosed with such notice. Each such notice shall be mailed by first-class mail at such a time that not less than 10 full days shall elapse between the date of mailing the notice and the date of the meeting, and shall be mailed to the member at his last address as it appears on the records of the association. The proposed sale, lease, or exchange, as the case may be, shall be adopted upon receiving at least two-thirds of the votes entitled to be cast by members present at the meeting, if a quorum is present.

(b) A mortgage or pledge of, or any other security interest in, all or any part or parts of the property of the association may be made by authority of the board of directors of the association without authorization of the members, unless otherwise provided in the charter or bylaws adopted by the members. (1963, c. 1168, s. 13.)

§ 54-166. Rights of objecting members.

(a) Any member of an association effecting a merger or consolidation may give to the association prior to or at the meeting of the members to which the proposal of merger or consolidation is submitted to a vote, written notice that he objects to such proposal. Within 20 days after the date on which the vote was taken, such member may, unless he votes in favor of the proposal, make written demand on the association for payment of the fair market value of his stock or other property rights or interest in the association. Such demand shall state the number and class of shares of stock owned by him or the nature and amount of other property rights or interest owned by him in the association. In addition to any other right he may have in law or equity, a member giving such notice shall be entitled, if and when the merger or consolidation is effected, to be paid by the surviving or new association, the fair market value of such stock, or other property rights or interests, as of the day prior to the date on which the vote was taken, subject only to the surrender by him of the certificate or certificates or other evidence of ownership of such stock or other property rights or interests.

(b) If within 30 days after the date upon which the objecting member becomes entitled to payment for such stock or other property rights or interest, the fair market value of such stock or other property rights or interests is agreed upon between the member and the surviving or new association, as the case may be, payment therefor shall be made within 60 days after the agreement, upon surrender of the certificate or other evidence of such property rights or interests, whereupon the member shall cease to have any interest in such stock or other property rights or interests in the association.

(c) If within the 30-day period mentioned in subsection (b) of this section the member and the association do not agree as to the fair market value of such stock or other property rights or interests, the member may, within 60 days after the expiration of the 30-day period, file a petition in the superior court of the county in which the association has its registered office or principal place of business asking for the appointment by the clerk of the superior court of that county of three qualified and disinterested appraisers to appraise the fair market value of such stock or other property rights or interests. A summons as in other cases of special proceedings, together with a copy of the petition, shall be served on the association at least 10 days prior to the hearing of the petition by the court. The award of the appraisers, or a majority of them, if no exceptions be filed thereto within 10 days after the award shall have been filed in court, shall be confirmed by the court, and when confirmed shall be final and conclusive, and the member, upon depositing with the court the proper stock certificates or other evidence of such property rights or interests, shall be entitled to judgment against the association for the appraised value thereof as of the day prior to the date on which the vote was taken, together with interest thereon to the date of such confirmation. If either party files exceptions to such award within 10 days after the award shall have been filed in court, the case shall be transferred to the civil issue docket of the superior court for trial during term and shall be there tried in the same manner, as near as may be practicable, as is provided in Chapter 40 of the General Statutes for the trial of cases under the eminent domain law of this State, and with the same right of appeal to the appellate division as is permitted in that Chapter. The court shall assess the cost of the proceedings as it shall deem equitable. Upon payment of the judgment the owner of such stock or other property rights or interests shall cease to have any interest in the association and the association shall be entitled to have said stock certificates or other evidence of such property rights or interests surrendered to the association by the clerk of court. Unless the member shall file such petition within the time herein prescribed, he and all persons claiming under him shall have no right of payment hereunder, but in that event nothing herein shall impair his status as a member.

(d) If in the notices sent to members in connection with the meeting to vote upon a proposed merger or consolidation no reference is made as required by this Article to the provisions of this section, any member entitled to but who did not avail himself of the provisions of this section, unless he voted for the proposal, is entitled, if he so demands in writing within one year after the effective date of the merger or consolidation, to recover from the surviving or new association, as the case may be, any damage which he suffered from failure of the association of which he was a member to make the aforesaid reference.

(e) The liability to pay for shares or to pay damages imposed by this section on an association extends to the successor association which acquires the assets of the predecessor, whether by merger or consolidation.

(f) Shares of stock acquired by an association pursuant to payment of the agreed fair market value thereof or to payment of the judgment entered therefor as in this section provided, may be held and disposed of by the association as in the case of other treasury shares.

(g) The provisions of this section shall not apply to a merger if on the date of the filing of the articles of merger the surviving association is the owner of all the outstanding shares of the other association, domestic or foreign, participating in the merger and if such merger makes no changes in the relative rights of the members of the surviving association.

(h) Notwithstanding any of the foregoing provisions of this section, no member of an association effecting a merger or consolidation, who objects thereto and makes written demand for payment of the fair market value of his stock or other property rights or interests in the association, as hereinbefore provided in this section, shall be entitled to such payment at any time prior to the time that he would otherwise be entitled to payment pursuant to valid provisions of such stock, or valid provisions of the charter or the bylaws of the association, in effect on the date of the vote for such merger or consolidation. However, in any case where the owner of such stock or other property rights or interests in the association is not entitled, because of valid provisions of his stock, or because of valid provisions of the charter or bylaws of the association, to payment at the time hereinbefore provided in this section, the fair market value of such stock or other property rights or interests in the association, as of the day prior to the date on which the vote was taken, may be determined in any manner hereinbefore provided in this section, and the amount so determined, without interest, shall be an obligation of the surviving or new association, as the case may be, and shall be due and payable at the time that the owner thereof would be entitled to payment pursuant to valid provisions of such stock, or valid provisions of the charter or the bylaws of the association. (1963, c. 1168, s. 13; 1973, c. 108, s. 19.)

Editor's Note. — Chapter 40, referred to in this section, was repealed by Session Laws 1981, c. 919. See now Chapter 40A.

Chapter 54A.

Capital Stock Savings and Loan Associations.

Sec.

54A-1 to 54A-27. [Repealed.]

§§ 54A-1 to 54A-27: Repealed by Session Laws 1981, c. 282, s. 2, effective May 1, 1981.

Cross References. — For present provisions as to savings and loan associations, see Chapter 54B.

Chapter 54B.

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Article 13.**Savings and Loan Holding Companies.**

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ARTICLE 1.***General Provisions.*****§ 54B-1. Title.**

This Chapter shall be known and may be cited as "Savings and Loan Associations." (1981, c. 282, s. 3.)

Legal Periodicals. — For comment on usury law in North Carolina, see 47 N.C.L. Rev. 761 (1969).

§ 54B-2. Purpose.

The purpose of this Chapter is:

- (1) To provide for the safe and sound conduct of the business of savings and loan associations, the conservation of their assets and the maintenance of public confidence in savings and loan associations;
- (2) To provide for the protection of the interests of customers and members, and the public interest in the soundness of the savings and loan industry;
- (3) To provide the opportunity for savings and loan associations to remain competitive with each other and with other savings and financial institutions existing under other laws of this and other states and the United States;
- (4) To provide the opportunity for savings and loan associations to serve effectively the convenience and advantage of customers and members, and to improve and expand their services and facilities for such purposes;

- (5) To provide the opportunity for the management of savings and loan associations to exercise prudent business judgment in conducting the affairs of savings and loan associations to the extent compatible with the purposes recited in this section; and
- (6) To provide adequate rulemaking power and administrative discretion so that the regulation and supervision of savings and loan associations are readily responsive to changes in economic conditions and in savings and loan practices. (1981, c. 282, s. 3.)

§ 54B-3. Applicability of Chapter.

The provisions of this Chapter, unless the context otherwise specifies, shall apply to all State associations. (1981, c. 282, s. 3.)

§ 54B-4. Definitions and application of terms.

(a) The terms "building and loan association" and "savings and loan association" when used in the General Statutes, shall mean an association and shall be interchangeable. Use of either term shall be construed to include the other unless a different intention is expressly provided.

(b) As used in this Chapter, unless the context otherwise requires, the term:

- (1) "Administrator" means the Administrator of the Savings and Loan Division.
- (2) "Aggregate withdrawal value of withdrawable accounts" means the total value of all withdrawable accounts held by an association.
- (3) "Application" means the completed package of the application to organize a State association, establish a branch office or conversion of structure of a savings and loan association which the Administrator considers in making his recommendation.
- (4) "Associate" when used to indicate a relationship with any person, means (i) any corporation or organization (other than the applicant or a majority-owned subsidiary of the applicant) of which such person is an officer or partner or is, directly or indirectly, the beneficial owner of ten percent (10%) or more of any class of equity securities, (ii) any trust or other estate in which such person has a substantial beneficial interest or as to which such person serves as trustee or in a similar fiduciary capacity, and (iii) that person's spouse, father, mother, children, brothers, sisters, and grandchildren; the father, mother, brothers, and sisters of that person's spouse; and the spouse of that person's child, brother or sister.
- (5) "Association" includes a State association or a federal association unless limited by use of the words "State" or "federal."
- (6) "Borrowers" means those who borrow funds from or in any other way become obligated on a loan to an association.
- (7) "Branch office" means an office of an association other than its principal office which renders savings and loan services.
- (8) "Capital stock" means securities which represent ownership of a stock association.
- (9) "Certificate of approval" means a document signed by the Administrator informing the North Carolina Secretary of State that the Commission has approved the certificate of incorporation of a proposed association.
- (10) "Certificate of authority to enter" means the document issued by the Administrator to permit a foreign association to conduct business in this State.
- (11) "Certificate of incorporation or charter" means the document which represents the corporate existence of a State association.

- (12) "Certified copy" means a copy of an original document or paper which has been signed by the person or persons who certify such document to be an exact copy of the original.
- (13) "This Chapter" means Chapter 54B of the North Carolina General Statutes.
- (14) "Commission" means the North Carolina Savings and Loan Commission of the Department of Commerce.
- (15) "Conflict of interest" means a matter before the board of directors in which one or more of the directors, officers or employees has a direct or indirect financial interest in its outcome.
- (16) "Conformed copies" means photocopies or carbon copies or other mechanical reproductions of an original document or paper.
- (17) "Court of competent jurisdiction" means a court in North Carolina which is qualified to hear the case at hand.
- (18) "Disinterested directors" means those directors who have absolutely no direct or indirect financial interest in the matter before them.
- (19) "Dividends on stock" means the earnings of an association paid out to holders of capital stock in a stock association.
- (20) "Dividends on withdrawable accounts" means the consideration paid by an association to a holder of a withdrawable account for the use of his money.
- (21) "Division" means the Savings and Loan Division of the North Carolina Department of Commerce.
- (22) "Entrance fee per withdrawable account" means the amount to be paid by each person, firm or corporation when he or it pledges to a proposed mutual association to deposit funds in a withdrawable account.
- (23) "Examination and investigation" means a supervisory inspection of an association or proposed association which may include inspection of every relevant piece of information including subsidiary or affiliated businesses.
- (24) "Federal association" means a corporation or association organized and operated under the provisions of federal law and regulation to conduct a savings and loan business.
- (25) "Financial institution" means a person, firm or corporation engaged in the business of receiving, soliciting or accepting money or its equivalent on deposit and/or lending money or its equivalent.
- (26) "Foreign association" means a corporation or association organized in another state to conduct a savings and loan business and is so like a State association that it may, after qualifying, be certified to conduct the savings and loan business in this State.
- (27) "General reserve" means appropriated or restricted funds in the form of cash or investments to be used solely for the purpose of absorbing losses.
- (28) "Guaranty association" means a mutual deposit guaranty association which is a corporation organized under this Chapter or its predecessor and operated under the provisions of Article 12 of this Chapter.
- (29) "Immediate family" means one's spouse, father, mother, children, brothers, sisters, and grandchildren; and the father, mother, brothers, and sisters of one's spouse; and the spouse of one's child, brother or sister.
- (30) "Initial pledges for withdrawable accounts" means those pledges of funds by persons who promise to a proposed mutual association to deposit such amount if and when such proposed association becomes established.
- (31) "Insurance of withdrawable accounts" means insurance on an association's withdrawable accounts when the beneficiary is the holder of such insured account.

- (32) "Liquidity fund" means that portion of the assets of an association which is required to be held in readily marketable form.
- (33) "Members" means those persons who hold withdrawable accounts or are borrowers from a mutual association and are deemed the owners of the association.
- (34) "Minimum amount of consideration" means the amount of money a stock association shall be required to have received on the sale of its stock, before it shall commence business.
- (35) "Minimum amount on deposit in withdrawable accounts" means the amount of money which a mutual association must have on hand prior to its commencement of business.
- (36) "Mutual association" means all mutual savings and loan associations owned by members of the association, and organized under the provisions of this Chapter or its predecessor for the primary purpose of promoting thrift and home financing.
- (37) "Net withdrawal value of withdrawable accounts" means the aggregate of the withdrawal value of an association's withdrawable accounts less the amount of any pledged withdrawable account which serves as security for a loan.
- (38) "Net worth" means an association's total assets less total liabilities.
- (39) "Original incorporators" means the organizers of a State association responsible for the business of a proposed association from the filing of the application to the Commission's final decision on such application.
- (40) "Plan of conversion" means a detailed outline of the procedure of the conversion of an association from one to another regulatory authority or from one to another form of ownership.
- (41) "Principal office" means the office which houses the headquarters of an association.
- (42) "Proposed association" means an entity in organizational procedures prior to the Commission's final decision on its charter application.
- (43) "Registered agent" means the person named in the certificate of incorporation upon whom service of legal process shall be deemed binding upon the association.
- (44) "Rules and regulations" means those regulatory procedures and guidelines issued by the Administrator and approved by the Commission.
- (45) "Service corporation" means a corporation operating under the provision of Article 8 of this Chapter which engages in activities determined by the Administrator by rules and regulations to be incidental to the conduct of a savings and loan business as provided in this Chapter or activities which further or facilitate the corporate purposes of an association, or which furnishes services to an association or subsidiaries of an association, the voting stock of which is owned directly or indirectly by one or more associations.
- (46) "Specific reserve account" means an account held by an association as a loss reserve for coverage on specific loans and investments.
- (47) "This State" means the State of North Carolina.
- (48) "State association" means a corporation or association organized under this Chapter or its predecessor and operated under the provisions of this Chapter to conduct the savings and loan business; or a corporation organized under the provisions of the predecessors to this Chapter and operated under the provisions of this Chapter; or a corporation organized under the provisions of federal law and so converted as to be operated under the provisions of this Chapter.
- (49) "Stock association" means any corporation or company owned by holders of capital stock and organized under the provisions of this

Chapter for the primary purpose of promoting thrift and home financing.

- (50) "Subscriptions" means the promise to purchase capital stock in a stock association and payment of a portion of the selling price.
- (51) "Total assets" means the aggregate amount of assets of any and every kind held by an association.
- (52) "Voluntary dissolution" means the dissolution and liquidation of an association initiated by its ownership.
- (53) "Withdrawable accounts" means accounts in which a customer or member places funds with an association which may be withdrawn by the account holder.
- (54) "Withdrawable application" means the request in writing by a withdrawable account holder to withdraw part or all of his balance. (1981, c. 282, s. 3; 1981 (Reg. Sess., 1982), c. 1238, s. 1.)

Effect of Amendments. — The 1981 (Reg. Sess., 1982) amendment, rewrote subdivision (b)(27), which formerly read: " 'General reserve account' means the account from which an association shall meet its losses."

ARTICLE 2.

Incorporation and Organization.

§ 54B-5. Severability.

If any section or subsection of this Chapter, or the application thereof to any person is held invalid, the remaining sections or subsections of this Chapter, and the application of such section or subsection to any other person, shall not be invalidated or affected thereby. (1981, c. 282, s. 3.)

§ 54B-6. Hearings.

Any hearing required to be held by this Chapter shall be conducted in accordance with the applicable provisions of Article 3 of Chapter 150A of the General Statutes. (1981, c. 282, s. 3.)

§ 54B-7. Application of Chapter on business corporations.

All the provisions of law relating to private corporations, and particularly those enumerated in Chapter 55, of the General Statutes, entitled "Business Corporation Act," which are not inconsistent with this Chapter, or with the proper business of savings and loan associations shall be applicable to all State associations. (1981, c. 282, s. 3.)

§ 54B-8. Scope and prohibitions; existing charters; injunctions.

(a) Nothing in this Chapter shall be construed to invalidate any charter that was valid prior to the enactment of this Chapter. All such associations shall continue operation in full force, but such associations shall be operated in accordance with the provisions of this Chapter.

(b) Foreign associations certified to operate in this State may do so only when in accordance with the provisions of Article 11 of this Chapter.

(c) No person or group of persons, nor any corporation, company, or association except one incorporated and licensed in accordance with the provisions of this Chapter to operate a State association, shall operate as a State association.

Unless so authorized as a State, federal or foreign association and actually engaged in transacting a savings and loan business, no person or group of persons, nor any corporation, company, or association domiciled and doing business in this State shall:

- (1) Use in its name the terms "building and loan association" or "savings and loan association" or words of similar import or connotation that lead the public reasonably to believe that the business so conducted is that of a savings and loan association; or
 - (2) Use any sign, or circulate or use any letterhead, billhead, circular or paper whatsoever, or advertise or communicate in any manner that would lead the public reasonably to believe that it is conducting the business of a savings and loan association.
- (d) Upon application by the Administrator or by any savings and loan association, a court of competent jurisdiction may issue an injunction to restrain any person or entity from violating or from continuing to violate any of the foregoing provisions of subsection (c). (1981, c. 282, s. 3.)

§ 54B-9. Application to organize a savings and loan association.

(a) It shall be lawful for any 10 or more natural persons (hereinafter referred to as the "incorporators"), who are domiciled in this State, to organize and establish a savings and loan association in order to promote thrift and home financing, subject to approval as hereinafter provided in this Chapter. The incorporators shall file with the Administrator a preliminary application to organize a State association, in the form to be prescribed by the Administrator, together with the proper nonrefundable application fee.

(b) The application to organize a State association shall be received by the Administrator not less than 60 days prior to the scheduled consideration of the application by the Commission, and it shall contain:

- (1) The original of the certificate of incorporation, which shall be signed by the original incorporators, or a majority of them, but not less than 10, and shall be properly acknowledged by a person duly authorized by this State to take proof or acknowledgment of deeds; and two conformed copies;
- (2) The names and addresses of the incorporators; and the names and addresses of the initial members of the board of directors;
- (3) Statements of the anticipated receipts, expenditures, earnings and financial condition of the association for its first two years of operation, or such longer period as the Administrator may require;
- (4) A showing satisfactory to the Commission that:
 - a. The public convenience and advantage will be served by the establishment of the proposed association;
 - b. There is a reasonable demand and necessity in the community which will be served by the establishment of the proposed association;
 - c. The proposed association will have a reasonable probability of sustaining profitable and beneficial operations within a reasonable time in the community in which the proposed association intends to locate;
 - d. The proposed association, if established, will promote healthy and effective competition in the community in the delivery to the public of savings and loan services;
- (5) The proposed bylaws;
- (6) Statements, exhibits, maps and other data which may be prescribed or requested by the Administrator, which data shall be sufficiently

detailed and comprehensive so as to enable the administrator to pass upon the criteria set forth in this Article.

(c) The application shall be signed by the original incorporators or a majority of them but not less than 10, and shall be properly acknowledged by a person duly authorized by this State to take proof and acknowledgement of deeds. (1981, c. 282, s. 3.)

§ 54B-10. Certificate of incorporation.

(a) The certificate of incorporation of a proposed mutual savings and loan association shall set forth:

- (1) The name of the association, which must not so closely resemble the name of an existing association doing business under the laws of this State as to be likely to mislead the public;
- (2) The county and city or town where its principal office is to be located in this State; and the name of its registered agent and the address of its registered office, including county and city or town, and street and number;
- (3) The period of duration, which may be perpetual. When the certificate of incorporation fails to state the period of duration, it shall be considered perpetual;
- (4) The purposes for which the association is organized, which shall be limited to purposes permitted under the laws of this State for savings and loan associations;
- (5) The amount of the entrance fee per withdrawable account based upon the amount pledged;
- (6) The minimum amount on deposit in withdrawable accounts before it shall commence business;
- (7) Any provision not inconsistent with this Chapter and the proper operation of a savings and loan association, which the incorporators shall set forth in the certificate of incorporation for the regulation of the internal affairs of the association;
- (8) The number of directors, which shall not be less than seven, constituting the initial board of directors (which may be classified in accordance with the provisions of G.S. 55-26), and the name and addresses of each person who is to serve as a director until the first meeting of members, or until his successor be elected and qualified;
- (9) The names and addresses of the incorporators.

(b) The certificate of incorporation of a proposed stock savings and loan association shall set forth:

- (1) The name of the association, which must not so closely resemble the name of an existing association doing business under the laws of this State as to be likely to mislead the public;
- (2) The county and city or town where its principal office is to be located in this State; and the name of its registered agent and the address of its registered office, including county and city or town, and street and number;
- (3) The period of duration, which may be perpetual. When the certificate of incorporation fails to state the period of duration, it shall be considered perpetual;
- (4) The purposes for which the association is organized, which shall be limited to purposes permitted under the laws of this State for savings and loan associations;
- (5) With respect to the shares of stock which the association shall have authority to issue:
 - a. If the stock is to have a par value, the number of such shares of stock and the par value of each;

- b. If the stock is to be without par value, the number of such shares of stock;
 - c. If the stock is to be of both kinds mentioned in paragraphs a and b of subdivision (5) of this subsection, particulars in accordance with those paragraphs;
 - d. If the stock is to be divided into classes, or into series within a class of preferred or special shares of stock, the certificate of incorporation shall also set forth a designation of each class, with a designation of each series within a class, and a statement of the preferences, limitations, and relative rights of the stock of each class or series;
- (6) The minimum amount of consideration to be received for its shares of stock before it shall commence business;
 - (7) A statement as to whether stockholders have preemptive rights to acquire additional or treasury shares of the association and any provision limiting or denying said rights;
 - (8) Any provision not inconsistent with this Chapter or the proper operation of a savings and loan association, which the incorporators shall set forth in the certificate of incorporation for the regulation of the internal affairs of the association;
 - (9) The number of directors, which shall not be less than seven, constituting the initial board of directors (which may be classified in accordance with the provisions of G.S. 55-26) and the name and address of each person who is to serve as a director until the first meeting of the stockholders, or until his successor be elected and qualified;
 - (10) The names and addresses of the incorporators.

(c) The certificate of incorporation, whether for a mutual association or stock association, shall be signed by the original incorporators, or a majority of them, but not less than 10, and shall be acknowledged before an officer duly authorized under the law of this State to take proof or acknowledgement of deeds, and shall be filed along with two conformed copies in the office of the Administrator as provided in G.S. 54B-9. (1981, c. 282, s. 3.)

Editor's Note. — The reference to § 54B-8 at the end of subsection (c) of this section should be to § 54B-9.

§ 54B-11. Administrator to consider application.

(a) Upon receipt of an application the Administrator shall examine or cause to be examined all the relevant facts connected with the formation of the proposed association. If it appears to the Administrator that the proposed association has complied with all the requirements set forth in this Chapter for the formation of a State association, and with all the requirements set forth in the regulations for the formation of a State association and that the association is otherwise lawfully entitled to form a State association, the Administrator shall present the application to the Commission.

(b) If the Administrator determines that an application is not in procedural compliance with this Chapter, or if any part of the application contains incorrect or insufficient information so that the Administrator cannot make a recommendation on the application, he shall notify the incorporators. He shall include suggestions as to amendments to the application so that it may conform.

(c) If the Administrator determines that an application is in procedural compliance with this Chapter, but for some substantive reason the Administra-

tor believes that the application should not be approved, the Administrator shall recommend to the Commission at a public hearing conducted pursuant to G.S. 54B-13 that it deny the application. (1981, c. 282, s. 3.)

§ 54B-12. Criteria to be met before the Administrator may recommend approval of an application.

(a) The Administrator may recommend approval of an application to form a mutual association only when all of the following criteria are met:

- (1) The proposed association has an operational expense fund, from which to pay organizational and incorporation expenses, in an amount determined by the Administrator to be sufficient for the safe and proper operation of the association, but in no event less than seventy-five thousand dollars (\$75,000). The moneys remaining in such expense fund shall be held by the association for at least one year from its date of licensing. No portion of such fund shall be released to an incorporator or director who contributed to it, nor to any other contributor, nor to any other person and no dividends shall be accrued or paid on such funds without the prior approval of the administrator.
- (2) The proposed association has pledges for withdrawable accounts in an amount determined by the Administrator to be sufficient for the safe and proper operation of the association, but in no event less than three hundred fifty thousand dollars (\$350,000).
- (3) All entrance fees for withdrawable accounts of the proposed association have been made with legal tender of the United States.
- (4) All initial pledges for withdrawable accounts of the proposed association are made by residents of North Carolina.
- (5) The name of the proposed association will not mislead the public and is not the same as an existing association or so similar to the name of an existing association as to mislead the public.
- (6) The character, general fitness and responsibility of the incorporators and the initial board of directors of the proposed association who shall be residents of North Carolina are such as to command the confidence of the community in which the proposed association intends to locate.
- (7) There is a reasonable demand and necessity in the community which will be served by the establishment of the proposed association.
- (8) The public convenience and advantage will be served by the establishment of the proposed association.
- (9) The proposed association will have a reasonable probability of sustaining profitable and beneficial operations in the community.
- (10) The proposed association, if established, will promote healthy and effective competition in the community in the delivery to the public of savings and loan services.

(b) The Administrator may recommend approval of an application to form a stock association only when all of the following criteria are met:

- (1) The proposed association has subscriptions for capital stock in an amount determined by the Administrator to be sufficient for the safe and proper operation of the association, but in no event less than one million five hundred thousand dollars (\$1,500,000).
- (2) The proposed association has certified that it shall set aside from the amount of subscriptions for capital stock required by subdivision (1) of this subsection, as a permanent capital reserve, an amount of funds determined by the Administrator to be sufficient for the safe and proper operation of the association, but in no event less than five hundred thousand dollars (\$500,000).

- (3) All subscriptions for capital stock of the proposed association have been purchased with legal tender of the United States.
- (4) All owners of subscriptions for capital stock of the proposed association are natural persons and residents of this State.
- (5) The proposed association has certified that it will neither sell nor permit the transfer to any corporate person or to any person not a resident of this State any stock in the proposed association from the time of application until 180 days following the opening for business by such association.
- (6) No person, either alone or in combination with members of his immediate family, owns subscriptions for more than ten percent (10%) of the stock in the proposed association.
- (7) No financial institution owns subscriptions for stock in the association. Notwithstanding any other provision of this Chapter, stock ownership in a stock savings and loan association shall not be held by any other financial institution, except in the following situations:
 - a. A financial institution holding stock of a stock savings and loan association in a fiduciary or trust capacity, provided that, the financial institution shall whenever possible assign the voting rights in the stock to a disinterested person; provided further that, in no event may the financial institution exercise the voting rights in more than five percent (5%) of the outstanding stock in a stock savings and loan association;
 - b. A financial institution holding stock of a stock savings and loan association for a reasonable time for the sole purpose of sale to the general public, provided that, the financial institution shall not vote the stock;
 - c. A financial institution holding for a reasonable time, in its name or the name of its nominee, stock of a stock savings and loan association for the sole purpose of sale, where the stock was acquired through foreclosure or a convenience in lieu of foreclosure on a loan for which the stock served as collateral, provided that, the financial institution shall not vote the stock;
 - d. A financial institution holding stock of a stock savings and loan association as collateral for a loan, provided that, that stock is not registered in the name of the financial institution or in the name of a nominee of the financial institution, provided further that, the financial institution shall not vote the stock; or
 - e. For purposes of merger as provided in G.S. 54B-38.
- (8) The name of the proposed association will not mislead the public and is not the same as an existing association or so similar to the name of an existing association as to mislead the public; and contains the wording "corporation," "incorporated," "limited," or "company," an abbreviation of one of such words or other words sufficient to distinguish stock associations from mutual associations.
- (9) The character, general fitness, and responsibility of the incorporators, initial board of directors and initial stockholders of the proposed association who shall be residents of North Carolina are such as to command the confidence of the community in which the proposed association intends to locate.
- (10) There is a reasonable demand and necessity in the community which will be served by the establishment of the proposed association.
- (11) The public convenience and advantage will be served by the establishment of the proposed association.
- (12) The proposed association will have a reasonable probability of sustaining profitable and beneficial operations in the community.

- (13) The proposed association, if established, will promote healthy and effective competition in the community in the delivery to the public of savings and loan services. (1981, c. 282, s. 3.)

§ 54B-13. Savings and Loan Commission to review findings and recommendations of Administrator.

(a) If the Administrator does not have the completed application within 120 days of the filing of the preliminary application, the application shall be returned to the applicants.

(b) When the Administrator has completed his examination and investigation of the facts relevant to the establishment of the proposed association, he shall present his findings and recommendations to the Commission at a public hearing. The Savings and Loan Commission must approve or reject an application within 180 days of the submission of the preliminary application.

(c) Not less than 60 days prior to the public hearing held for the consideration of the application to establish a savings and loan association, the incorporators shall cause to be published a notice in a newspaper of general circulation in the area to be served by the proposed association. Such notice shall contain:

- (1) A statement that the application has been filed with the Administrator;
- (2) The name of the community where the principal office of the proposed association intends to locate;
- (3) A statement that a public hearing shall be held to consider the application; and
- (4) A statement that any interested or affected party may file a written statement either favoring or protesting the creation of the proposed association. Such statement must be filed with the Administrator within 30 days of the date of publication.

(d) The Commission, at the public hearing, shall consider the findings and recommendation of the Administrator and shall hear such oral testimony as he may wish to give or be called upon to give, and shall also receive information and hear testimony from the incorporators of the proposed association and from any and all other interested or affected parties. The Commission shall hear only testimony and receive only information which is relevant to the consideration of the application and the operation of the proposed association. (1981, c. 282, s. 3.)

§ 54B-14. Grounds for approval or denial of application.

(a) After consideration of the findings and recommendation of the Administrator and his oral testimony, if any, and the consideration of such other information and evidence, either written or oral, as has come before it at the public hearing, the Commission shall approve or disapprove the application within 30 days after the public hearing. The Commission shall approve the application if it finds that the certificate of incorporation is in compliance with the provisions of G.S. 54B-10, that all the criteria set out in G.S. 54B-12 have been complied with, and that all other applicable provisions of this Chapter and the General Statutes have been complied with.

(b) If the Commission approves the application, the Administrator shall so notify the Secretary of State with a certificate of approval, accompanied by the original of the certificate of incorporation and the two conformed copies.

(c) Upon receipt of the certificate of approval, the original of the certificate of incorporation, and the two conformed copies, the Secretary of State shall examine the certificate of incorporation to determine whether it is in compliance with the provisions of any applicable General Statutes other than this

Chapter. If it is in compliance, the Secretary of State shall, upon the payment by the newly chartered association of the appropriate organization tax and fees, file the certificate of incorporation in accordance with G.S. 55-4, except that he shall certify under his official seal the two conformed copies of the certificate of incorporation, one of which shall forthwith be forwarded to the incorporators or their representative, for the purpose of recordation in the office of the register of deeds of the county where the principal office of the association shall be located, in accordance with G.S. 55-4(a)(6), the other of which shall be forwarded to the office of the Administrator for filing. Upon the recordation of the certificate of incorporation by the Secretary of State, the association shall be a body politic and corporate under the name stated in such certificate, and shall be authorized to begin the savings and loan business when duly licensed by the Administrator.

(d) The said certificate of incorporation, or a copy thereof, duly certified by the Secretary of State, or by the register of deeds of the county where the association is located, or by the Administrator, under their respective seals, shall be evidence in all courts and places, and shall, in all judicial proceedings, be deemed prima facie evidence of the complete organization and incorporation of the association purporting thereby to have been established. (1981, c. 282, s. 3.)

§ 54B-15. Final decision.

The Commission shall present the Administrator with a final decision which shall be in accordance with the applicable provisions of Chapter 150A of the General Statutes. (1981, c. 282, s. 3.)

§ 54B-16. Appeal.

The final decision of the Commission may be appealed in accordance with Chapter 150A of the General Statutes. (1981, c. 282, s. 3.)

§ 54B-17. Insurance of accounts required.

All State associations must obtain and maintain insurance on all members' and customers' withdrawable accounts. Contracts for such insurance may be made with any mutual deposit guaranty association organized under Article 12 of this Chapter, or its predecessor, or from the Federal Savings and Loan Insurance Corporation. Prior to the licensing of an association, a certificate of incorporation duly recorded under the provisions of G.S. 54B-14(c), shall be deemed to be sufficient certification to the insuring corporation that the association is a legal corporate entity. Such insurance must be obtained within the time limit prescribed in G.S. 54B-18. (1981, c. 282, s. 3.)

§ 54B-18. Time allowed to commence business.

A newly chartered association shall commence business within six months after the date upon which its corporate existence shall have begun. An association which shall not commence business within such time, shall forfeit its corporate existence, unless the administrator, before the expiration of such six-month period, shall have approved an extension of the time within which the association may commence business, upon a written request stating the reasons for which such request is made. Upon such forfeiture, the certificate of incorporation shall expire, and any and all action taken in connection with the incorporation and chartering of the association, with the exception of fees paid to the Division, shall become null and void. The Administrator shall determine if an association has failed to commence business within six months, without

extension as provided in this section, and shall notify the Secretary of State and the register of deeds in the county in which the association is located that the certificate of incorporation has expired. (1981, c. 282, s. 3.)

§ 54B-19. Licensing.

A newly chartered association shall be entitled to a license to operate upon payment to the Division of the appropriate license fee as prescribed by the Administrator, when it shows to the satisfaction of the Administrator evidence of capable, efficient and equitable management, and when it passes a final inspection by the Administrator or his representatives preceding the opening of its doors for business. (1981, c. 282, s. 3.)

§ 54B-20. Amendments to certificate of incorporation.

(a) Any addition, alteration or amendment to the certificate of incorporation of any State association shall be made at any annual or special meeting of such association, held in accordance with the provisions of G.S. 54B-106 and G.S. 54B-107, by a majority of votes or shares cast by members or stockholders present in person or by proxy at such meeting. Any such addition, alteration or amendment shall be signed, submitted to the Administrator for his approval or rejection, and if approved, then certified and recorded as provided in G.S. 54B-14 for certificates of incorporation.

(b) Notwithstanding the provisions of subsection (a) of this section, any State association may change its registered office or its registered agent or both in accordance with the provisions of G.S. 55-14. A copy of the statement or certificate certified by the Secretary of State shall be filed in the office of the Administrator. (1981, c. 282, s. 3; 1981 (Reg. Sess., 1982), c. 1238, s. 4.)

Effect of Amendments. — The 1981 (Reg. Sess., 1982) amendment, designated the original section as subsection (a) and added subsection (b). In present subsection (a), the amendment substituted "votes or shares cast by members or stockholders" for "total votes which members of a mutual association are eligible

and entitled to cast, all by a majority of the total votes which stockholders of a stock association are eligible and entitled to cast," deleted "represented" near the end of the first sentence and substituted "as provided in G.S. 54B-14" for "as provided for in G.S. 54B-9 and 54B-10."

§ 54B-21. List of stockholders to be maintained.

Every stock association organized and operated under the provisions of this Chapter or its predecessor shall at all times cause to be kept an up-to-date list of the names of all its stockholders. Annually, in January or whenever called upon by the Administrator, file in the office of the Administrator a correct list of all its stockholders, the resident address of each, the number of shares of stock held by each, and the dates of issue. (1981, c. 282, s. 3.)

Editor's Note. — The second sentence of this section, which lacks a subject, is set out above

exactly as it appears in Session Laws 1981, c. 282, s. 3.

§ 54B-22. Branch offices.

(a) Any State association may apply to the Administrator for permission to establish a branch office. The application shall be in such form as may be prescribed by the Administrator and shall be accompanied by the proper branch application fee. Branch applications shall be approved or denied by the Administrator within 120 days of filing.

(b) The Administrator shall approve a branch application when all of the following criteria are met:

- (1) The applicant has gross assets of at least ten million dollars (\$10,000,000);
- (2) The applicant has evidenced financial responsibility;
- (3) The applicant has a net worth equal to or exceeding the amount required by the insurer of the applicant's withdrawable accounts;
- (4) The applicant has an acceptable internal control system. Such a system would include certain basic internal control requirements essential to the protection of assets and the promotion of operational efficiency regardless of the size of the applicant. Some of the factors which require extensive internal control requirements such as the use of the controller or internal auditor and more distinctive placement responsibilities include the applicant's size, number of personnel and history of and anticipated plans for expansion.

(c) Upon receipt of a branch application, the Administrator shall examine or cause to be examined all the relevant facts connected with the establishment of the proposed branch office. If it appears to the satisfaction of the Administrator that the applicant has complied with all the requirements set forth in this section and the regulations for the establishment of a branch office and that the association is otherwise lawfully entitled to establish such branch office, then the administrator shall approve the branch application.

(d) Not more than 10 days following the filing of the branch application with the Administrator, the applicant shall cause a notice to be published in a newspaper of general circulation in the area to be served by the proposed branch office. Such notice shall contain:

- (1) A statement that the branch application has been filed with the Administrator;
- (2) The proposed address of the branch office, including city or town and street; and
- (3) A statement that any interested or affected party may file a written statement with the Administrator, within 30 days of the date of the publication of the notice, protesting the establishment of the proposed branch office and requesting a hearing before the Administrator on the application.

(e) Any interested or affected party may file a written statement with the Administrator within 30 days of the date of initial publication of the branch application notice, protesting the establishment of the proposed branch office and requesting a hearing before the Administrator on the application. If a hearing is held on the branch application, the Administrator shall only receive information and hear testimony from the applicant and from any interested or affected party which is relevant to the branch application and the operation of the proposed branch office. The Administrator shall issue his final decision on the branch application within 30 days following the hearing. Such final decision shall be in accordance with the applicable provisions of Chapter 150A of the General Statutes.

(f) If a hearing is not held on the branch application, the Administrator shall issue his final decision within 120 days of the filing of the application. Such final decision shall be in accordance with the applicable provisions of Chapter 150A of the General Statutes.

(g) to (i) Repealed by Session Laws 1981 (Regular Session, 1982), c. 1238, s. 3.

(j) Any party to a branch application may appeal the final decision of the Administrator to the Commission at any time after final decision, but not later than 30 days after a written copy of the final decision is served upon the party and his attorney of record by personal service or by certified mail. Failure to file such appeal within the time stated shall operate as a waiver of the right

of such party to review by the Commission and by a court of competent jurisdiction in accordance with Chapter 150A of the General Statutes, relating to judicial review. (1981, c. 282, s. 3; 1981 (Reg. Sess., 1982) c. 1238, s. 3.)

Effect of Amendments. — The 1981 (Reg. Sess., 1982) amendment, so changed this section that a detailed comparison is not here practical.

§ 54B-23. Application to change location of a branch or principal office.

(a) The board of directors of a State association may change the location of a branch office or the principal office of the association by submitting to the Administrator an application for such change on forms prescribed by the Administrator.

(b) Upon receipt of an application accompanied by the proper application fee, the Administrator shall conduct, or cause to be conducted, an examination and investigation of the facts and circumstances connected with the consideration of the application. After such examination and investigation, the Administrator shall make a recommendation to the Commission on the application at a properly publicized hearing at which other concerned parties may present their views.

(c) If an application filed under this section is approved by the Commission and the association fails to change the location of such branch office or principal office within six months after the date of the order approving such application, such approval shall be revoked. Such a six-month period may be extended upon a showing to the satisfaction of the Administrator of good cause. (1981, c. 282, s. 3.)

§ 54B-24. Approval revoked; branch office.

The Commission may, for good cause and after a hearing, order the closing of a branch office. Such order shall be made in writing to the association and shall fix a reasonable time after which the association shall close the branch office. (1981, c. 282, s. 3.)

§ 54B-25. Branch office closed.

The board of a State association may discontinue the operation of a branch office upon 60 days prior written notice to the administrator. The association shall notify the Administrator in writing of the date upon which the branch office shall be closed. (1981, c. 282, s. 3.)

§§ 54B-26 to 54B-29: Reserved for future codification purposes.

ARTICLE 3.

Fundamental Changes.

§ 54B-30. Conversion from State to federal association.

Any State savings and loan association, stock or mutual, organized and operated under the provisions of this Chapter, may convert into a federal savings and loan association in accordance with the provisions of the laws and regulations of the United States and with the same force and effect as though originally incorporated under such laws, and the procedure to effect such conversion shall be as follows:

- (1) The association shall submit a plan of conversion to the Administrator, and he may approve the same, with or without amendment, or refuse to approve the plan. If he approves the plan, then the plan shall be submitted to the members or stockholders as provided in the next subdivision. If he refuses to approve the plan, he shall state his objections in writing and give the converting association an opportunity to amend the plan to obviate such objections or to appeal his decision to the Commission.
- (2) A meeting of the members or stockholders shall be held upon not less than 15 days' notice to each member or stockholder. Notice can be made either by mailing such to each member or stockholder, postage prepaid, to the last known address or by the board of directors causing to be published once a week for two weeks preceding such meeting, in a newspaper of general circulation published in the county where such association has its principal office, a notice of the meeting. It shall be regarded as sufficient notice of the purpose of the meeting if the notice contains the following statement: "The purpose of this meeting is to consider the conversion of this State-chartered association into a federally chartered association, pursuant to the laws of the United States." An appropriate officer of the association shall make proof by affidavit at such meeting of due service of the notice or call for said meeting.
- (3) At the meeting of the members or stockholders of such association, such members or stockholders may by affirmative vote of a majority of votes or shares present, in person or by proxy, resolve to convert said association to a federal savings and loan association. A copy of the minutes of the meeting of the members or stockholders certified by an appropriate officer of the association shall be filed in the office of the Administrator within 10 days after such meeting. The said certified copy when so filed shall be prima facie evidence of the holding and the action of the meeting.
- (4) Within a reasonable time after the receipt of a certified copy of the minutes, the Administrator shall either approve or disapprove the proceedings of the meeting for compliance with the procedure set forth in this section. If the Administrator approves the proceedings he shall endorse the certified copy of the minutes, and shall issue a certificate of his approval of the conversion and proceedings and send the same to the association. Such certificate shall be recorded in the office of the Secretary of State and in the office of the register of deeds of the county in which the association has its principal office, and the original shall be held by the association. If the Administrator disapproves the proceedings he shall note his disapproval on the certified copy of the minutes and notify the Commission and the association of his disapproval. The association may appeal a disapproval to the Commission.
- (5) Within 60 days after approval of the proceedings by the Administrator, the association shall file an application, in the manner prescribed or authorized by the laws and regulations of the United States, to consummate the conversion to a federal association. A copy of the charter or authorization issued to such association by the Federal Home Loan Bank Board, or a certificate showing the organization or conversion of such association into a federal savings and loan association, and upon such filing with the Administrator the association shall cease to be a State association and shall be a federal association.
- (6) Whenever any such association shall convert into a federal savings and loan association it shall cease to be an association under the laws of this State, except that its corporate existence shall be deemed to be

extended for the purpose of prosecuting or defending suits by or against it and of enabling it to close its business affairs as a State association, and to dispose of and convey its property. At the time when such conversion becomes effective, all the property of the state association including all its rights, title and interest in and to all property of whatever kind, whether real, personal or mixed, and things in action, and every right, privilege, interest and asset of any conceivable value or benefit then existing, belonging or pertaining to it, or which would inure to it, shall immediately by act of law and without any conveyance or transfer, and without any further act or deed, be vested in and become the property of the federal association, which shall have, hold and enjoy the same in its own right as fully and to the same extent as the same was possessed, held and enjoyed by the State association; and the federal association as of the effective time of such conversion shall succeed to all the rights, obligations and relations of the State association. (1981, c. 282, s. 3; 1981 (Reg. Sess., 1982), c. 1238, s. 5.)

Effect of Amendments. — The 1981 (Reg. Sess., 1982) amendment, in subdivision (2), substituted "15 days' notice" for "30 days' written notice" in the first sentence, deleted "served personally or mailed to the last known address of such member or stockholder, postage prepaid" at the end of that sentence and rewrote

the second sentence, which formerly read: "The notice shall contain a statement of the time, place and purpose for which such meeting is called." In subdivision (3), the amendment substituted "votes or shares present" for "shares or votes eligible to be cast by members or stockholders."

§ 54B-31. Conversion from federal to State association.

Any federal savings and loan association, stock or mutual, organized and existing under the laws and regulations of the United States and duly authorized to operate and actually operating in North Carolina may convert into a State savings and loan association operating under the provisions of this Chapter, with the same force and effect as though originally incorporated under the provisions of this Chapter, by complying with the rules and regulations of the federal regulatory authority, and also by following the procedure as set forth in this section:

- (1) The federal association shall submit a plan of conversion to the Administrator. When such plan, either with or without amendment, has been approved by the Administrator, it shall be submitted to the members or stockholders of the association as provided in the next subdivision.
- (2) A meeting of the members or stockholders shall be held upon not less than 15 days' notice to each member or stockholder. Notice can be made either by mailing such to each member or stockholder, postage prepaid, to the last known address or by the board of directors causing to be published once a week for two weeks preceding such meeting, in a newspaper of general circulation published in the county where such association has its principal office, a notice of the meeting. It shall be regarded as sufficient notice of the purpose of the meeting if the call contains the following statement: "The purpose of this meeting is to consider the conversion of this federally chartered association to a State-chartered savings and loan association, pursuant to the provisions of the laws of the State of North Carolina." An appropriate officer of the association shall make proof by affidavit at such meeting of the due service of the notice or call for said meeting.
- (3) At the meeting of the members or stockholders of such association, such members or stockholders may by affirmative vote of a majority of votes or shares present, in person or by proxy, resolve to convert said

association to a State association. A copy of the minutes of the meeting of the members or stockholders, certified by an appropriate officer of the association, shall be filed with the Administrator within 10 days after the meeting, accompanied by a conversion fee. The certified copy when so filed shall be prima facie evidence of the holding of and the action taken at the meeting.

- (4) Within 30 days after the approval of the proceedings by the Administrator and the approval of the conversion by the federal authority, and by the insuring corporation, the association shall file with the Administrator, the Secretary of State, and the register of deeds of the county where such association intends to operate a copy of the certificate of incorporation of such association, signed by at least seven directors. The certificate of incorporation shall conform to the provisions of the laws of this State. The Secretary of State and the register of deeds of the county where the association has its principal office shall not issue or record the certificate of incorporation until authorized to do so by the Administrator. Upon receipt of a copy of the certificate of incorporation the Administrator shall cause to be made a careful examination and investigation of the facts connected with the conversion of the association, including an examination of its affairs generally and a determination of its assets and liabilities. The reasonable cost and expenses of the examination and investigation shall be paid by the association. If it appears that the association, if converted, will lawfully be entitled to conduct business as a State association pursuant to the provisions of this Chapter, the Administrator shall so certify to the Secretary of State and the register of deeds in the county in which the association is located, who shall thereupon issue and record such certificate of incorporation. Upon issuance and recordation of the certificate of incorporation the association shall file with the appropriate federal regulatory authority a certified copy of same. Upon such filing, the association shall cease to be a federal association and shall be converted to a State association.
- (5) Upon conversion, all the property of the federal association, including all its rights, title and interest in and to all property of whatsoever kind whether real, personal or mixed, and things in action, and every right, privilege, interest and asset of any conceivable value or benefit then existing, belonging or pertaining to it, or which would inure to it, shall immediately by act of law and without any conveyance or transfer, and without any further act or deed, be vested in and become the property of the State association, which shall have, hold, and enjoy the same in its own right as fully and to the same extent as if the same was possessed, held or enjoyed by said federal association; and such State association shall be deemed to be a continuation of the entity and the identity of said federal association, operating under and pursuant to the provisions of this Chapter, and all rights, obligations and relations of said federal association to or in respect to any person, estate, or creditor, depositor, trustee or beneficiary of any trust, and to or in respect to any executorship or trusteeship or other trust or fiduciary function, shall remain unimpaired, and the State association, shall by operation of this section succeed to all such rights, obligations, relations and trusts, and the duties and liabilities connected therewith, and shall execute and perform each and every such right, obligation, trust and relation in the same manner as if such State association had itself assumed the trust or relation, including the obligations and liabilities connected therewith. (1981, c. 282, s. 3; 1981 (Reg. Sess., 1982) c. 1238, s. 6.)

Effect of Amendments. — The 1981 (Reg. Sess., 1982) amendment, in subdivision (2), substituted "15 days' notice" for "30 days' written notice" in the first sentence and rewrote the second sentence, which formerly read: "The notice shall contain a statement of the time, place and purpose for which such meeting is called." In subdivision (3), the amendment sub-

stituted "such" for "the" preceding "association" and preceding "members" near the beginning of the first sentence, substituted "votes or shares present" for "those votes eligible to be cast by members or stockholders" and substituted "said" for "the" preceding "association to a State" near the end of the first sentence.

§ 54B-32. Simultaneous charter and ownership conversion.

(a) In the event of a State charter to federal charter conversion, when the form of ownership will also simultaneously be changed from stock to mutual, or from mutual to stock, the conversion shall proceed initially as if it involves only a charter conversion, under G.S. 54B-30. After the association becomes a federal association, then the federal regulatory authority shall govern the continuing conversion of the form of ownership of such newly converted association.

(b) In the event of a federal charter to State charter conversion, when the form of ownership will also simultaneously be changed from stock to mutual or from mutual to stock, the conversion shall proceed initially as if it involves only a charter conversion, under G.S. 54B-31. After the association becomes a State association, the provisions of G.S. 54B-33 or 54B-34 shall govern the continuing conversion of the form of ownership of such newly converted association.

(c) The provisions of this section shall not apply to any simultaneous charter and ownership conversion accomplished in conjunction with a merger under the provisions of G.S. 54B-39. (1981, c. 282, s. 3; 1981 (Reg. Sess., 1982), c. 1238, s. 9.)

Effect of Amendments. — The 1981 (Reg. Sess., 1982) amendment, added subsection (c).

§ 54B-33. Conversion of mutual to stock association.

(a) Any mutual association may convert from mutual to the stock form of ownership as provided in this section.

(b) A mutual association may apply to the Administrator for permission to convert to a stock association and for certification of appropriate amendments to the association's certificate of incorporation. Upon receipt of an application to convert from mutual to stock form the Administrator shall examine all facts connected with the requested conversion. The expenses and cost of such examination, monitoring and supervision shall be paid by the association applying for permission to convert.

(c) Upon completion of his examination the Administrator shall report his findings to the Commission. After reviewing the findings of the Administrator and conducting any further appropriate examinations and investigations the Commission may approve and permit the requested conversion if it appears that:

- (1) After conversion the association will be in sound financial condition and will be soundly managed;
- (2) The conversion will not impair the capital of the association nor adversely affect the association's operations;
- (3) The conversion will be fair and equitable to the members of the association and no person whether member, employee or otherwise, will receive any inequitable gain or advantage by reason of the conversion;

- (4) The savings and loan services provided to the public by the association will not be adversely affected by the conversion;
- (5) The conversion will be conducted as provided by law and pursuant to a plan approved by the Administrator. The substance of the plan must be approved by a vote of two thirds of the board of directors of the association; and, after lawful notice to the members of the association and full and fair disclosure, the substance of the plan must be approved by a majority of the total votes which members of the association are eligible and entitled to cast. Such a vote by the members may be in person or by special proxy restricted to matters in connection with the conversion;
- (6) The plan of conversion provides:
 - a. All shares of stock issued in connection with the conversion are offered first to the members of the association;
 - b. All stock shall be offered to members of the association and others in prescribed amounts and otherwise pursuant to a formula and procedure which is fair and equitable and will be fairly disclosed to all interested persons;
 - c. Members to whom stock will be offered and the amounts of stock which will be offered shall be determined as of a date or dates approved by the Administrator;
 - d. A statement as to whether stockholders shall have preemptive rights to acquire additional or treasury shares of the association and any provision limiting or denying said rights;
 - e. At the time of the conversion, the number of shares which any person may acquire together with any associate or group of persons acting in concert shall not exceed five percent (5%) of the total number of shares offered. For purposes of this paragraph, the members of the converting institution's board of directors shall not be deemed to be associates or a group acting in concert solely as a result of their board membership.
 - f. At the time of the conversion, the total amount of stock acquired by officers and directors shall not exceed twenty-five percent (25%) of the total number of shares issued in connection with the conversion;
 - g. The conversion shall not be complete until all stock offered in connection with the conversion has been subscribed.
- (d) After approval of a requested conversion by the Commission, the Administrator shall supervise and monitor the conversion process and he shall ensure that the conversion is conducted pursuant to law and the association's approved plan of conversion.
- (e) Upon conversion of a mutual association to the stock form of ownership, the legal existence of the association shall not terminate but the converted stock association shall be a continuation of the mutual association. The conversion shall be deemed a mere change in identity or form of organization. All rights, liabilities, obligations, interest and relations of whatever kind of the mutual association shall continue and remain in the stock-owned association. All actions and legal proceedings to which the association was a party prior to conversion shall be unaffected by the conversion and proceed as if the conversion had not taken place.
- (f) The Administrator shall promulgate rules and regulations to govern conversions; provided, however, that such rules and regulations as may be promulgated by the Administrator shall be equal to or exceed the requirements for conversion imposed by the rules and regulations governing conversions of federal chartered mutual savings and loan associations of the Federal Home Loan Bank Board as set forth in the Federal Register, Vol. 44, No. 62, Thursday, March 29, 1979, entitled "Part 563b Conversion From Mutual to

Stock Form” as these may be amended from time to time and other applicable rules and regulations effective as of the date of ratification. No provision of this section is to be interpreted to require Federal Savings and Loan Insurance Corporation (FSLIC) insurance of accounts as a prerequisite to conversion. All State associations are to continue to be allowed to choose between FSLIC and a mutual deposit guaranty association. Said rules and regulations shall implement the provisions of this section and provide procedures by which an association shall seek permission for a conversion and procedures for conducting conversions. Provided, however, the rules and regulations promulgated under this section shall apply equally to all converting associations and no converting association shall enjoy a competitive advantage over another type of converting association by reason of the rules and regulations governing its conversion; provided further, however, no association shall be required by the Administrator or by regulation to change the type of insurance it maintains on its withdrawable accounts by reason of this section.

(g) Notwithstanding the provisions of this section, any State mutual association maintaining FSLIC insurance of accounts coverage may convert from mutual to stock form of ownership by complying with the requirements for conversion from mutual to stock form of ownership imposed by the rules and regulations of the Federal Home Loan Bank Board as set forth in the Federal Register, Vol. 44, No. 62, Thursday, March 29, 1979, entitled “Part 563b Conversion From Mutual to Stock Form” as amended from time to time and other applicable rules and regulations effective as of the date of ratification. Any such conversion shall have full force and effect as if such conversion were conducted pursuant to this section and the rules and regulations promulgated by the Administrator pursuant to subsection (f) of this section. (1981, c. 282, s. 3; 1981 (Reg. Sess., 1982), c. 1238, s. 7.)

Effect of Amendments. — The 1981 (Reg. Sess., 1982) amendment, added subsection (g).

§ 54B-34. Conversion of stock associations to mutual associations.

Any stock savings and loan association organized and operating under the provisions of this Chapter may, subject to the approval of the Commission, convert to a mutual savings and loan association under the provisions of this section. The Administrator may promulgate rules and regulations governing the conversion of stock associations to mutual associations. Such rules and regulations shall include, but shall not be limited to requirements that:

- (1) The conversion neither impair the capital of the converting association nor adversely affect its operations;
- (2) The conversion shall be fair and equitable to all stockholders of the converting associations;
- (3) The public shall not be adversely affected by the conversion;
- (4) Conversion of an association shall be accomplished only pursuant to a plan approved by the Administrator. Said plan must have been approved by an affirmative vote of two thirds of the members of the board of directors of the converting association, and only after a full and fair disclosure to the stockholders, by an affirmative vote [of] a majority of the total votes which stockholders of the association are eligible and entitled to cast;
- (5) The plan of conversion provides that:
 - a. Withdrawable accounts be issued in connection with the conversion to the stockholders of the converting association;

- b. A uniform date be fixed for the determination of the stockholders to whom, and the amount to each stockholder of which, withdrawable accounts shall be made available;
- c. Withdrawable accounts so made available to stockholders be based upon a fair and equitable formula approved by the Administrator and fully and fairly disclosed to the stockholders of the converting association. (1981, c. 282, s. 3.)

§ 54B-35. Merger of like savings and loan associations.

Any two or more mutual associations or any two or more stock associations organized and operating, may merge or consolidate into a single association which may be either one of said merging associations, and the procedure to effect such merger shall be as follows:

- (1) The directors, or a majority of them, of such associations as desire to merge, may, at separate meetings, enter into a written agreement of merger signed by them and under the corporate seals of the respective associations, specifying each association to be merged and the association which is to receive into itself the merging association or associations, and prescribing the terms and conditions of the merger and the mode of carrying it into effect. Such merger agreement may provide the manner and basis of converting or exchanging the withdrawable accounts in the mutual association or associations so merged for withdrawable accounts of the same or a different class of the receiving association, or of converting or exchanging the stock in the stock association or associations so merged for the stock of the same or a different class of the receiving association. The merger agreement may provide for such other provisions with respect to the merger as appear necessary or desirable, or as the Administrator may require by regulation to enable him to discharge his duties with respect to such merger.
- (2) Such merger agreement together with copies of the minutes of the meetings of the respective boards of directors verified by the secretaries of the respective associations shall be submitted to the Administrator, who shall cause a careful investigation and examination to be made of the affairs of the associations proposing to merge, including a determination of their respective assets and liabilities. The reasonable cost and expenses of such examination shall be defrayed by each association so investigated and examined. If, as a result of such investigation, he shall conclude that the members or stockholders of each of the associations proposing to merge will be benefited thereby, he shall, in writing, approve same. If he deems that the proposed merger will not be in the interest of all members or stockholders of the associations so merging, he shall, in writing, disapprove the same. If he approves the merger agreement, then same shall be submitted, within 45 days after notice of such associations of such approval, to the members or stockholders of each of such association, as provided in the next subdivision. Such disapproval may be appealed by the association to the Commission.
- (3) A special meeting of the members or stockholders of each of said associations shall be held separately upon written notice to each member or stockholder of not less than 20 days, specifying the time, place, and purpose for which such meeting is called and such notice shall be served personally or sent by mail, postage prepaid, to each member or stockholder at the last known address of such member or stockholder appearing upon the books of the association. Due notice may also be given of the time, place and object of such meeting by publication at

least once a week for four successive weeks in one or more newspapers published in the county or counties wherein each such association has its principal or a branch office (and if there is no newspaper published in the county then in a newspaper published in an adjoining county). The secretary or other officer of the association shall make proof by affidavit at such meeting of the due service of the notice or call for said meeting.

- (4) At separate meetings of the members or stockholders of the respective associations, such members or stockholders may adopt, by an affirmative vote of a majority of the votes or shares present, in person or by proxy, a resolution to merge into a single association upon the terms of the merger agreement as shall have been agreed upon by the directors of the respective associations and as approved by the Administrator. Upon the adoption of the resolution, a copy of the minutes of the proceedings of the meetings of the members or stockholders of the respective associations, certified by the president or vice-president and secretary or assistant secretary of the merging associations, shall be filed in the office of the Administrator, within 10 days after such meetings. Within 15 days after the receipt of a certified copy of the minutes of said meetings the Administrator shall either approve or disapprove the proceedings for compliance with this section. If the proceedings are approved by him he shall so endorse the certified copy of the minutes of his office, and shall issue a certificate of his approval of the merger and send same to each of the associations. The certificate shall be filed and recorded in the office of the Secretary of State and in the office of the register of deeds of the county or counties in this State in which the respective associations so merged shall have their original certificates of incorporation recorded; provided, that the only fees that shall be collected in connection with the merger of said associations shall be filing and recording fees. When such certificate is so filed, the merger agreement shall take effect according to its terms and shall be binding upon all the members or stockholders of the associations so merging, and the same shall thence be taken and deemed to be the act of merger of such constituent savings and loan associations under the laws of this State, and such record or certified copy thereof shall be evidence of the agreement and act of merger of said savings and loan associations and the observance and performance of all acts and conditions necessary to have been observed and performed precedent to such merger. If the Administrator shall disapprove the proceedings he shall mark the certified copies of the meetings in his office as disapproved and notify the associations to that effect. Such disapproval may be appealed by the association to the Commission.
- (5) Upon the merger of any association, as above provided, into another:
 - a. Its corporate existence shall be merged into that of the receiving association; and all and singular its rights, powers, privileges and franchises, and all of its property, including all right, title, interest in and to all property of whatsoever kind, whether real, personal or mixed, and things in action, and every right, privilege, interest or asset of any conceivable value or benefit then existing, belonging or pertaining to it, or which would inure to it under an unmerged existence, shall immediately by act of law and without any conveyance or transfer, and without any further act or deed, be vested in and become the property of such receiving association which shall have, hold and enjoy the same in its own right as fully and to the same extent as if the same were possessed, held or enjoyed by the association or associations so

merged; and such receiving association shall absorb fully and completely the association or associations so merged.

- b. Its rights, liabilities, obligations and relations to any person shall remain unchanged and the association into which it has been merged shall, by the merger, succeed to all the relations, obligations and liabilities as though it had itself assumed or incurred the same. No obligation or liability of a member, customer or stockholder in an association which is a party to the merger shall be affected by the merger, but obligations and liabilities shall continue as they existed before the merger, unless otherwise provided in the merger agreement.
 - c. A pending action or other judicial proceeding to which any association that shall be so merged is a party, shall not be deemed to have abated or to have discontinued by reason of the merger, but may be prosecuted to final judgment, order or decree in the same manner as if the merger had not been made; or the receiving association may be substituted as a party to such action or proceeding, and any judgment, order or decree may be rendered for or against it that might have been rendered for or against such other association if the merger had not occurred.
- (6) Notwithstanding any other provision of this section, the Administrator may waive any or all of the foregoing requirements upon finding that such waiver would be in the best interest of the members or stockholders of the merging associations. (1981, c. 282, s. 3; c. 670, s. 1; 1981 (Reg. Sess., 1982), c. 1238, s. 8.)

Effect of Amendments. — The 1981 amendment substituted “and” for “or” following “organized” in the introductory paragraph. Session Laws 1981, c. 670, s. 3, provides: “This act is effective upon ratification but shall not apply to any savings and loan association chartered, but not yet operating, prior to said effective date.” The act was ratified June 24, 1981.

The 1981 (Reg. Sess., 1982) amendment, deleted “State” preceding “mutual” and preceding “stock” near the beginning of the introductory paragraph, substituted “45” for “30” in the next-to-last sentence of subdivision

(2) and “20” for “30” near the middle of the first sentence in subdivision (3), rewrote the first sentence of subdivision (4), deleted the former second sentence of subdivision (4), relating to soliciting special proxies, and added subdivision (6).

In amending subdivision (2), the 1981 (Reg. Sess., 1982) amendment referred to “the last sentence” of the subdivision. The next-to-last sentence was plainly intended, and the amendment has been given effect in the section as set out above.

§ 54B-36. Merger of associations where ownership is converted.

(a) Any two or more State mutual associations organized or operating may merge to form a single State stock association. The procedure to effect such a merger and conversion of ownership shall be as follows:

- (1) The merging associations shall merge (to form a mutual association), as provided under G.S. 54B-35.
- (2) The surviving association shall then convert to a stock association, as provided under G.S. 54B-33.

(b) Any two or more State stock associations organized or operating may merge to form a single mutual association. The procedure to effect such a merger and conversion of ownership shall be as follows:

- (1) The merging associations shall merge (to form a stock association), as provided under G.S. 54B-35.
- (2) The surviving association shall then convert to a mutual association, as provided under G.S. 54B-34.

(c) The Administrator may promulgate rules and regulations to facilitate the transition from two or more associations to a single association under a new form of ownership. (1981, c. 282, s. 3.)

§ 54B-37. Merger of mutual and stock associations.

(a) Any State mutual association and any State stock association, organized or operating, may merge to form a single stock association. The procedure to effect such a merger shall be as follows:

- (1) The mutual association involved shall convert separately to a stock association, as provided under G.S. 54B-33.
- (2) The two stock associations shall then merge to form a single stock association, as provided in G.S. 54B-35.

(b) Any State mutual association, and any State stock association organized or operating may merge to form a mutual association. The procedure to effect such merger shall be as follows:

- (1) The stock association involved shall convert separately to a mutual association, as provided under G.S. 54B-34.
- (2) The two mutual associations shall then merge to form a single mutual association, as provided in G.S. 54B-35.

(c) The Administrator is hereby empowered to promulgate rules and regulations to facilitate such a merger of mutual with stock associations. (1981, c. 282, s. 3.)

§ 54B-38. Merger through stock acquisition.

The Administrator may approve a plan by which an association may hold stock of other associations for the purpose of facilitating a merger of the associations. Such holding shall not exceed a period of one year from date of approval. If the merger is not consummated within the year, the holding association shall divest itself of all such stock within six months. The holding association may vote the stock only on matters relating to the merger. (1981, c. 282, s. 3.)

§ 54B-39. Merger of federal with State associations.

(a) Any two or more associations, when one or more is a State association and one or more is a federal association operating in North Carolina, may merge to form one association under either a State or federal charter.

(b) The Administrator shall promulgate rules and regulations to facilitate the merger of federal and State associations. (1981, c. 282, s. 3; 1981 (Reg. Sess., 1982), c. 1238, s. 10.)

Effect of Amendments. — The 1981 (Reg. Sess., 1982) amendment, rewrote this section, eliminating the former second sentence, including subdivisions numbered (1) and (2), of subsection (a), relating to the procedure to effect a merger when the result is to be a federal association, and former subsection (b), containing subdivisions numbered (1) and (2), relating to the procedure to effect a merger when the result

is to be a State association, and enacting former subsection (c) as present subsection (b). In present subsection (a), the amendment deleted "savings" preceding "associations" and "when" preceding "one or more is a federal association", and in present subsection (b), the amendment substituted "shall" for "may" and "federal and State associations" for "State and federal savings and loan associations."

§ 54B-40. Voluntary dissolution by directors.

A State association may be voluntarily dissolved by a majority vote of the board of directors as provided in subsection (a) of G.S. 55-116, and when a certificate of dissolution is recorded in the manner required by this Chapter for the recording of certificates of incorporation. (1981, c. 282, s. 3.)

§ 54B-41. Voluntary dissolution by stockholders or members.

At any annual or special meeting called for such purpose, an association may, by an affirmative vote in person or by proxy of at least two thirds of the total number of shares or votes which all members or stockholders of the association are entitled to cast, resolve to dissolve and liquidate the association and adopt a plan of voluntary dissolution. Upon adoption of such resolution and plan of voluntary dissolution, the members or stockholders shall proceed to elect not more than three liquidators who shall post bond as required by the Administrator. The liquidators shall have full power to execute the plan; and the procedure thereafter shall be as follows:

- (1) A copy of the resolution certified by the president or secretary of the association, together with the minutes of the meeting of members or stockholders, the plan of liquidation, and an itemized statement of the association's assets and liabilities sworn to by a majority of its board of directors, shall be filed with the Administrator. The minutes of the meeting of members or stockholders shall be certified by the president or secretary of the association, and shall set forth the notice given and the time of mailing thereof, the vote on the resolution and the total number of shares or votes which all members of the association were entitled to cast thereon, and the names of the liquidators elected.
- (2) If the Administrator finds that the proceedings are in accordance with the provisions of this Chapter, and that the plan of liquidation is not unfair to any person affected, he shall attach his certificate of approval to the plan and shall forward one copy to the liquidators and one copy to the association's withdrawable account insurance corporation. Once the Administrator has approved the resolution and the plan of liquidation it shall thereafter be unlawful for such association to accept any additional withdrawable accounts or additions to withdrawable accounts or make any additional loans, but all its income and receipts in excess of actual expenses of liquidation of the association shall be applied to the discharge of its liabilities.
- (3) The liquidator or liquidators so appointed shall be paid a reasonable compensation by the liquidating association subject to the approval of the Administrator.
- (4) The plan shall become effective upon the recording of the Administrator's certificate of approval in the manner required by this Chapter for the recording of the certificate of incorporation.
- (5) The liquidation of the association shall be subject to the supervision and examination of the Administrator. (1981, c. 282, s. 3.)

§ 54B-42. Rules, regulations and reports of voluntary dissolution.

(a) The Administrator shall promulgate rules and regulations governing the dissolution and liquidation of State associations. These rules and regulations shall include, but not be limited to, provisions with respect to:

- (1) The protection and liquidation of assets;
- (2) The plan of liquidation;
- (3) Notice to file claims;
- (4) Claims of members;
- (5) Payments of claims and distribution; and
- (6) Final distribution and liquidation.

(b) Upon completion of liquidation, the liquidators shall file with the Administrator a final report and accounting of the liquidation. The approval of the report by the Administrator shall operate as a complete and final discharge of the liquidators, the board of directors, and each member or stockholder in connection with the liquidation of such association. Upon approval of the report, the Administrator shall issue a certificate of dissolution of the association and shall record same in the manner required by this Chapter for the recording of certificates of incorporation; and upon such recording, the dissolution shall be effective. (1981, c. 282, s. 3.)

§ 54B-43. Stock ownership restrictions and dividends.

(a) Not more than ten percent (10%) of the outstanding capital stock of a State stock association may be owned by a person either singly or in combination with an associate.

(b) If, as of May 1, 1981, or at any time thereafter, a stockholder owns, singly or in combination with an associate, an amount in excess of ten percent (10%) of the outstanding capital stock of a stock association, the association shall notify the Administrator within 10 days of determination of this fact.

(c) Except as otherwise provided in this Chapter, no bank, State or federal association, credit union or other person, firm or corporation doing a banking business (receiving, soliciting or accepting money or its equivalent on deposit as a business) shall own stock in a stock association. Notwithstanding any other provision of this Chapter, a corporate trustee shall be permitted to hold legal ownership of stock in a stock association when such stock constitutes all or a portion of the corpus of a trust.

(d) No dividends on stock shall be paid unless the association has the approval of the Administrator. (1981, c. 282, s. 3.)

§ 54B-44. Supervisory mergers, consolidations, conversions, and combination mergers and conversions.

(a) Notwithstanding any other provision of this Chapter, in order to protect the public, including members, depositors and stockholders of a State association, the Administrator, upon making a finding that a State association is unable to operate in a safe and sound manner, may authorize or require a short form merger, consolidation, conversion, or combination merger and conversion of the State association as to which the finding is made. The resulting association may be a mutual association or a stock association.

(b) The Administrator shall promulgate rules and regulations to govern supervisory mergers, consolidations, conversions, and combination mergers and conversions authorized by this section. (1981, c. 670, s. 2; 1981 (Reg. Sess., 1982), c. 1238, s. 11.)

Editor's note. — Session Laws 1981, c. 670, s. 3, provides: "This act is effective upon ratification but shall not apply to any savings and loan association chartered, but not yet operating, prior to said effective date." The act

was ratified June 24, 1981.

Effect of Amendments. — The 1981 (Reg. Sess., 1982) amendment, in subsection (a), substituted "stockholders" for "shareholders" near the beginning of the first sentence, substituted

"authorize or require a short form merger, consolidation, conversion, or combination merger and conversion of the State association as to which the finding is made" for "authorize a short form conversion, if the finding is made with regard to a mutual association, or a merger or consolidation of the State association as

to which the finding was made, with any other State association" at the end of the first sentence and added the second sentence. In subsection (b), the amendment substituted "consolidations, conversions; and combination mergers and conversions" for "consolidations and conversions."

§§ 54B-45 to 54B-51: Reserved for future codification purposes.

ARTICLE 4.

Supervision and Regulation.

§ 54B-52. Administrator of Savings and Loan Division.

The Administrator of the Savings and Loan Division of the State is hereby empowered and directed to perform all the duties and exercise all the powers as to savings and loan associations organized or operated under this Chapter, unless herein otherwise provided. (1981, c. 282, s. 3.)

§ 54B-53. Savings and Loan Commission.

(a) The Savings and Loan Commission, which has heretofore been created, shall continue to exist and the seven members of the Savings and Loan Commission who have heretofore been appointed by the Governor shall continue to serve their full terms and their successors shall be appointed by the Governor as required by this section. The Governor shall on July 1, 1981, appoint three persons to the Commission for four-year terms. On July 1, 1983, he shall appoint two persons to the Commission for three-year terms, and two persons for four-year terms. All appointments to the Commission thereafter shall be for four-year terms. Any vacancy on the Commission shall be filled by the Governor for the unexpired term. A newly appointed commissioner shall assume office at the first regular or special meeting subsequent to his appointment.

(b) The members of the Commission shall elect one of their number to serve as chairman of the Commission for such term as set forth in rules adopted by the Commission. A vice-chairman and other officers may be elected as specified by the Commission.

(c) The term of a commissioner shall be four years, or until his successor is appointed and qualified.

(d) At least two members of the Commission shall be persons who are currently serving as managing officers of State associations. Four members of the Commission shall be appointed as representatives of the borrowing public and shall not be employees of or directors of any financial institution or have an interest in any financial institution other than as a result of being a depositor or borrower.

(e) Meetings of the Commission shall be held regularly as provided in rules adopted by the Commission but no less than once each calendar quarter. Special meetings shall be held at any time upon the call of the chairman, or upon the call of any three commissioners. The Administrator shall call meetings when consideration by the Commission is required by law for contemplated action of the Administrator. Members of the Commission shall be reimbursed as prescribed by law for expenses incurred in the performance of their duties under this section.

(f) The relationship between the Secretary of Commerce and the Savings and Loan Commission shall be as defined for a Type II transfer under Article [Chapter] 143A of the General Statutes.

(g) The Savings and Loan Commission is hereby vested with full power and authority to review, approve, disapprove, or modify any action taken by the Administrator in the exercise of all powers, duties and functions vested in or exercised by the Administrator under the savings and loan laws of this State. (1981, c. 282, s. 3.)

§ 54B-54. Deputy administrator of Savings and Loan Division.

(a) There shall be a deputy administrator of the Savings and Loan Division who, in the event of the absence, death, resignation, disability or disqualification of the Administrator, or in case the office of Administrator shall for any reason become vacant, shall have and exercise all the powers and duties vested by law in the Administrator.

(b) The deputy administrator is authorized and empowered at any and all times to perform such duties and exercise such powers of the Administrator as the Administrator may direct. (1981, c. 282, s. 3.)

§ 54B-55. Power of Administrator to promulgate rules and regulations; reproduction of records.

(a) The Administrator shall have the right, and is empowered, to promulgate rules, instructions and regulations as may be necessary to the discharge of his duties and powers as to savings and loan associations for the supervision and regulation of said associations, and for the protection of the public investing in said savings and loan associations.

(b) Without limiting the generality of the foregoing paragraph, rules, instructions, and regulations may be promulgated with respect to:

- (1) Reserve requirements;
- (2) Stock ownership and dividends;
- (3) Stock transfers;
- (4) Incorporators, stockholders, directors, officers and employees of an association;
- (5) Bylaws;
- (6) The Savings and Loan Commission;
- (7) The structure of the office of the Administrator;
- (8) The operation of associations;
- (9) Withdrawable accounts, bonus plans, and contracts for savings programs;
- (10) Loans and loan expenses;
- (11) Investments;
- (12) Forms and definitions;
- (13) Types of financial records to be maintained by associations;
- (14) Retention periods of various financial records;
- (15) Internal control procedures of associations;
- (16) Conduct and management of associations;
- (17) Chartering and branching;
- (18) Liquidations;
- (19) Mergers;
- (20) Conversions;
- (21) Reports which may be required by the Administrator;
- (22) Conflicts of interest;
- (23) Collection of State savings and loan taxes;
- (24) Service corporations; and
- (25) Savings and loan holding companies.

(c) In order to supervise the continuing operation of stock associations, the Administrator shall promulgate rules to ensure the compliance by such associations.

(d) Any association may cause any or all records by it to be reeorded, copied or reproduced by any photographic, photostatic or miniature photographic process which correctly, accurately, permanently copies, reproduces or forms a medium for copying or reproducing the original record on a film or other durable material.

(e) Any such photographic, photostatic or miniature photographic copy or reproduction shall be deemed to be an original record in all courts and administrative agencies for the purpose of its admissibility in evidence. A facsimile, exemplification or certified copy of any such photographic copy or reproduction shall, for all purposes, be deemed a facsimile, exemplification or certified copy of the original record.

(f) The provisions of this section with reference to the retention and disposition of records shall apply to any federal savings and loan association operating in North Carolina unless in conflict with regulations prescribed by its supervisory authority. (1981, c. 282, s. 3.)

§ 54B-56. Examinations by Administrator; report.

(a) If at any time the Administrator deems it prudent, it shall be his duty to examine and investigate everything relating to the business of a State association or a savings and loan holding company, and to appoint a suitable and competent person to make such investigation, who shall file with the Administrator a full report of his finding in such case, including in his report any violation of law or any unauthorized or unsafe practices of the association disclosed by his examination.

(b) The Administrator shall furnish a copy of the report to the association examined and may, upon request, furnish a copy of or excerpts from the report to the Federal Home Loan Bank Board, a Federal Home Loan Bank, any mutual deposit guaranty association organized and operated under the provisions of Article 12 of this Chapter, or the Federal Savings and Loan Insurance Corporation or its successor.

(c) No association may willfully delay or willfully obstruct an examination in any fashion. Any person failing to comply with this subsection shall be guilty of a misdemeanor.

(d) No person having in his possession or control any books, accounts or papers of any State association shall refuse to exhibit same to the Administrator or his agents on demand, or shall knowingly or willingly make any false statement in regard to the same. Any person failing to comply with this subsection shall be guilty of a misdemeanor. (1981, c. 282, s. 3.)

§ 54B-57. Supervision and examination fees.

(a) Every State association, including associations in process of voluntary liquidation or savings and loan holding company, shall pay into the office of the Administrator each July a supervisory fee. Examination fees shall be paid promptly upon an association's receipt of the examination billing. The Administrator, subject to the advice and consent of the Commission, shall, on or before June 1 of each year:

- (1) Determine and fix the scale of supervisory and examination fees to be assessed and collected during the next fiscal year;
- (2) Determine and fix the amount of the fee and set the fee collection schedule for the fees to be assessed to and collected from applicants to defray the cost of processing their charter, branch, merger, conversion, location change and name change applications and all fees associated with foreign associations.

(b) All funds and revenue collected by the Division under the provisions of this section and the provisions of all other sections of this Chapter which authorize the collection of fees and other funds shall be deposited with the State Treasurer of North Carolina and expended under the terms of the Executive Budget Act, solely to defray expenses incurred by the office of the Administrator in carrying out its supervisory and auditing functions.

(c) Notwithstanding any of the provisions of subsections (a) and (b) of this section, whenever the Administrator under the provisions of G.S. 54B-56 appoints a suitable and competent person, other than a person employed by the Administrator's office, to make an examination and investigation of the business of a State association, all costs and expenses relative to such examination and investigation shall be paid by such association. (1981, c. 282, s. 3.)

§ 54B-58. Prolonged audit, examination or revaluation; payment of costs.

(a) If, in the opinion of the Administrator, an examination conducted under the provisions of G.S. 54B-57 fails to disclose the complete financial condition of an association, he may in order to ascertain its complete financial condition:

- (1) Make an extended audit or examination of the association or cause such an audit or examination to be made by an independent auditor;
- (2) Make an extended revaluation of any of the assets or liabilities of the association or cause an independent appraiser to make such revaluation.

(b) The Administrator shall collect from the association a reasonable sum for actual or necessary expenses of such an audit, examination or revaluation. (1981, c. 282, s. 3.)

§ 54B-59. Cease and desist orders.

(a) If any person or association is engaging in, or has engaged in, any unsafe or unsound practice or unfair and discriminatory practice in conducting the association's business, or of any other law, rule, regulation, order or condition imposed in writing by the Administrator, the Administrator may issue a notice of charges to such person or association. A notice of charges shall specify the acts alleged to sustain a cease and desist order, and state the time and place at which a hearing shall be held. A hearing before the Commission on the charges shall be held no earlier than seven days, and no later than 14 days after issuance of the notice. The charged institution is entitled to a further extension of seven days upon filing a request with the Administrator. The Administrator may also issue a notice of charges if he has reasonable grounds to believe that any person or association is about to engage in any unsafe or unsound business practice, or any violation of this Chapter, or any other law, rule, regulation or order. If, by a preponderance of the evidence, it is shown that any person or association is engaged in, or has been engaged in, or is about to engage in, any unsafe or unsound business practice, or unfair and discriminatory practice or any violation of this Chapter, or any other law, rule, regulation, or order, a cease and desist order shall be issued. The Commission may issue a temporary cease and desist order to be effective for 14 days and may be extended once for a period of 14 days.

(b) If any person or State association is engaging in, has engaged in, or is about to engage in any unsafe or unsound practice in conducting the association's business, or any violation of this Chapter or of any other law, rules, regulation, order, or condition imposed in writing by the Administrator, and the Administrator has determined that immediate corrective action is required, the Administrator may issue a temporary cease and desist order. A temporary cease and desist order shall be effective immediately upon issuance

for a period of 14 days, and may be extended once for a period of 14 days. Such an order shall state its duration on its face and the words, "Temporary Cease and Desist Order." A hearing before the Commission shall be held within such time as such an order remains effective, at which time a temporary order may be dissolved or made permanent. (1981, c. 282, s. 3.)

§ 54B-60. Administrator to have right of access to books and records of association; right to issue subpoenas, administer oaths, examine witnesses.

(a) The Administrator and his agents:

- (1) Shall have free access to all books and records of an association, or a service corporation thereof, that relate to its business, and the books and records kept by an officer, agent or employee relating to or upon which any record is kept;
- (2) May subpoena witnesses and administer oaths or affirmations in the examination of any director, officer, agent, or employee of an association, or a service corporation thereof or of any other person in relation to its affairs, transactions and conditions;
- (3) May require the production of records, books, papers, contracts and other documents; and
- (4) May order that improper entries be corrected on the books and records of an association.

(b) The Administrator may issue subpoenas duces tecum.

(c) If a person fails to comply with a subpoena so issued or a party or witness refuses to testify on any matters, a court of competent jurisdiction, on the application of the Administrator, shall compel compliance by proceedings for contempt as in the case of disobedience of the requirements of a subpoena issued from such court or a refusal to testify in such court. (1981, c. 282, s. 3.)

§ 54B-61. Test appraisals of collateral for loans; expense paid.

(a) The Administrator may direct the making of test appraisals of real estate and other collateral securing loans made by associations doing business in this State, employ competent appraisers, or prescribe a list from which competent appraisers may be selected, for the making of such appraisals by the Administrator, and do any and all other acts incident to the making of such test appraisals.

(b) In lieu of causing such appraisals to be made, the Administrator may accept an appraisal caused to be made by a Federal Home Loan Bank, the Federal Home Loan Bank Board or by the Federal Savings and Loan Insurance Corporation or any mutual deposit guaranty association organized and operating under the provisions of Article 12 of this Chapter.

(c) The expense and cost of test appraisals made pursuant to this section shall be defrayed by the association subjected to such test appraisals, and each association doing business in this State shall pay all reasonable costs and expenses of such test appraisals when it shall be directed. (1981, c. 282, s. 3.)

§ 54B-62. Relationship of savings and loan associations with the Savings and Loan Division.

(a) Except as provided by subsection (b) of this section, a savings and loan association or any director, officer, employee, or representative thereof shall not grant or give to the Administrator or to any employee of the Administrator's office, or to their spouses, any loan or gratuity, directly or indirectly.

(b) Neither the Administrator nor any person on the staff of the Savings and Loan Division shall:

- (1) Hold an office or position in any State association or exercise any right to vote on any State association matter by reason of being a member of the association;
- (2) Be interested, directly or indirectly in any savings and loan association organized under the laws of this State; or
- (3) Undertake any indebtedness, as a borrower directly or indirectly or endorser, surety or guarantor, or sell or otherwise dispose of any loan or investment to any savings and loan association organized under the laws of this State.

(c) Notwithstanding subsection (b) of this section, the Administrator or any other person employed in or by his office may be a withdrawable account holder and receive earnings on such account.

(d) If the Administrator or other person has any prohibited right or interest in a savings and loan association, either directly or indirectly, at the time of his appointment or employment, he shall dispose of it within 60 days after the date of his appointment, or employment. If the Administrator or other such person is indebted as borrower directly or indirectly, or is an endorser, surety or guarantor on a note, at the time of his appointment or employment, he may continue in such capacity until such loan is paid off. (1981, c. 282, s. 3.)

§ 54B-63. Confidential information.

(a) The following records or information of the Commission, the Administrator or the agent(s) of either shall be confidential and shall not be disclosed:

- (1) Information obtained or compiled in preparation of or anticipation of, or during an examination, audit or investigation of any association;
- (2) Information reflecting the specific collateral given by a named borrower, the specific amount of stock owned by a named stockholder, or specific withdrawable accounts held by a named member or customer;
- (3) Information obtained, prepared or compiled during or as a result of an examination, audit or investigation of any association by an agency of the United States, if the records would be confidential under federal law or regulation;
- (4) Information and reports submitted by associations to federal regulatory agencies, if the records or information would be confidential under federal law or regulation;
- (5) Information and records regarding complaints from the public received by the Division which concern associations when the complaint would or could result in an investigation, except to the management of those associations;
- (6) Any other letters, reports, memoranda, recordings, charts or other documents or records which would disclose any information of which disclosure is prohibited in this subsection.

(b) A court of competent jurisdiction may order the disclosure of specific information.

(c) The information contained in an application shall be deemed to be public information. Disclosure shall not extend to the financial statement of the incorporators nor to any further information deemed by the Administrator to be confidential.

(d) Nothing in this section shall prevent the exchange of information relating to associations and the business thereof with the representatives of the agencies of this State, other states, or of the United States, or with reserve or insuring agencies for associations. The private business and affairs of an individual or company shall not be disclosed by any person employed by the

Savings and Loan Division, any member of the Commission, or by any person with whom information is exchanged under the authority of this subsection.

(e) Any official or employee violating this section shall be liable to any person injured by disclosure of such confidential information for all damages sustained thereby. Penalties provided shall not be exclusive of other penalties. (1981, c. 282, s. 3.)

§ 54B-64. Civil penalties; State associations.

(a) Except as otherwise provided in this Article, any association which is found to have violated any provision of this Article may be ordered to forfeit and pay a civil penalty of up to twenty thousand dollars (\$20,000). Any association which is found to have violated or failed to comply with any cease and desist order issued under the authority of this Article may be ordered to forfeit or pay a civil penalty of up to twenty thousand dollars (\$20,000) for each day that the violation or failure to comply continues.

(b) To enforce the provisions of this section, the Administrator is authorized to assess such a penalty and to appear in a court of competent jurisdiction and to move the court to order payment of the penalty. Prior to the assessment of the penalty, a hearing shall be held by the Administrator which shall comply with the provisions of Article 3 of Chapter 150A of the General Statutes.

(c) If the Administrator determines that, as a result of a violation of any provision of this Article, or of a failure to comply with any cease and desist order issued under the authority of this Article, a situation exists requiring immediate corrective action, the Administrator may impose the civil penalty in this section on the association without a prior hearing, and said penalty shall be effective as of the date of notice to the association. Imposition of such penalty may be directly appealed to the Wake County Superior Court.

(d) Nothing in this section shall prevent anyone damaged by a State association from bringing a separate cause of action in a court of competent jurisdiction. (1981, c. 282, s. 3.)

§ 54B-65. Civil penalties; directors, officers and employees.

(a) Any person, whether a director, officer or employee, who is found to have violated any provision of this Article, whether willfully or as a result of gross negligence, gross incompetency, or recklessness, may be ordered to forfeit and pay a civil penalty of up to five thousand dollars (\$5,000) per violation. Any person who is found to have violated or failed to comply with any cease and desist order issued under the authority of this Article, may be ordered to forfeit and pay a civil penalty of up to five thousand dollars (\$5,000) per violation for each day that the violation or failure to comply continues.

(b) To enforce the provisions of this section, the Administrator is authorized to assess such a penalty and to appear in a court of competent jurisdiction and to move the court to order payment of the penalty. Prior to the assessment of the penalty, a hearing shall be held by the Administrator which shall comply with the provisions of Article 3 of Chapter 150A of the General Statutes.

(c) Whenever the Administrator shall determine that an emergency exists which requires immediate corrective action, the Administrator, either before or after instituting any other action or proceeding authorized by this Article, may request the Attorney General to institute a civil action in a court of competent jurisdiction, in the name of the State upon the relation of the Administrator seeking injunctive relief to restrain or enjoin the violation or threatened violation of this Article and for such other and further relief as the court may deem proper. Instituting an action for injunctive relief shall not relieve any party to such proceedings from any civil or criminal penalty prescribed for violation of this Article.

(d) Nothing in this section shall prevent anyone damaged by a director, officer or employee of a State association from bringing a separate cause of action in a court of competent jurisdiction. (1981, c. 282, s. 3.)

§ 54B-66. Criminal penalties.

(a) The provisions of this section shall in no event extend to persons who are found to have acted only with gross negligence, simple negligence, recklessness or incompetence.

(b) In addition to any of the other penalties or remedies provided by this Article, the following shall be deemed to be misdemeanors and shall be punishable as provided in Chapter 14 of the North Carolina General Statutes:

- (1) The willful or knowing violation of the provisions of this Article by any employee of the Savings and Loan Division.
- (2) The willful or knowing violation of a cease and desist order which has become final in that no further administrative or judicial appeal is available.

(c) In addition to any of the other penalties or remedies provided by this Article, the willful omission, making, or concurrence in making or publishing a written report, exhibit, or entry in a financial statement on the books of the association, which contains a material statement known to be false shall be deemed to be a misdemeanor and shall be punishable as provided in Chapter 14 of the North Carolina General Statutes. For purposes of this section, "material" shall mean "so substantial and important as to influence a reasonable and prudent businessman or investor."

(d) The Administrator is authorized to enforce this section in a court of competent jurisdiction. (1981, c. 282, s. 3.)

§ 54B-67. Primary jurisdiction.

Whenever an agency of the United States government shall defer to the Administrator, or notify the Administrator of pending action against an association chartered by this State or fail to exercise its authority over any State- or federally-chartered association doing business in this State, the Administrator shall have the authority to exercise jurisdiction over such association. (1981, c. 282, s. 3.)

§ 54B-68. Supervisory control.

(a) Whenever the Administrator determines that an association is conducting its business in an unsafe or unsound manner or in any fashion which threatens the financial integrity or sound operation of the association, the Administrator may serve a notice of charges on the association, requiring it to show cause why it should not be placed under supervisory control. Such notice of charges shall specify the grounds for supervisory control, and set the time and place for a hearing. A hearing before the Commission pursuant to such notice shall be held within 15 days after issuance of the notice of charges, and shall comply with the provisions of Article 3 of Chapter 150A of the General Statutes.

(b) If, after the hearing provided above, Commission determines that supervisory control of the association is necessary to protect the association's members, customers, stockholders or creditors, or the general public, the Administrator shall issue an order taking supervisory control of the association. An appeal may be filed in the Wake County Superior Court.

(c) If the order taking supervisory control becomes final, the Administrator may appoint an agent to supervise and monitor the operations of the association during the period of supervisory control. During the period of supervisory

control, the association shall act in accordance with such instructions and directions as may be given by the Administrator directly or through his supervisory agent and shall not act or fail to act except when to do so would violate an outstanding cease and desist order.

(d) Within 180 days of the date the order taking supervisory control becomes final, the Administrator shall issue an order approving a plan for the termination of supervisory control. The plan may provide for:

- (1) The issuance by the association of capital stock;
- (2) The appointment of one or more officers and/or directors;
- (3) The reorganization, merger, or consolidation of the association;
- (4) The dissolution and liquidation of the association.

The order approving the plan shall not take effect for 30 days during which time period an appeal may be filed in the Wake County Superior Court.

(e) The costs incident to this proceeding shall be paid by the association, provided such costs are found to be reasonable.

(f) For the purposes of this section, an order shall be deemed final if:

- (1) No appeal is filed within the specific time allowed for the appeal, or
- (2) After all judicial appeals are exhausted. (1981, c. 282, s. 3.)

§ 54B-69. Removal of directors, officers and employees.

(a) If, in the Administrator's opinion, one or more directors, officers or employees of any association has participated in or consented to any violation of this Chapter, or any other law, rule, regulation or order, or any unsafe or unsound business practice in the operation of any association; or any insider loan not specifically authorized by or pursuant to this Chapter; or any repeated violation of or failure to comply with any association's bylaws, the Administrator may serve a written notice of charges upon the director, officer or employee in question, and the association, stating his intent to remove said director, officer or employee. Such notice shall specify the conduct and place for the hearing before the Commission to be held. A hearing shall be held no earlier than 15 days and no later than 30 days after the notice of charges is served, and it shall comply with the provisions of Article 3 of Chapter 150A of the General Statutes. If, after the hearing, the Commission determines that the charges asserted have been proven by a preponderance of the evidence, the Administrator may issue an order removing the director, officer or employee in question. Such an order shall be effective upon issuance and may include the entire board of directors or all of the officers of the association.

(b) If it is determined that any director, officer or employee of any association has knowingly participated in or consented to any violation of this Chapter, or any other law, rule, regulation or order, or engaged in any unsafe or unsound business practice in the operation of any association, or any repeated violation of or failure to comply with any association's bylaws, and that as a result, a situation exists requiring immediate corrective action, the Administrator may issue an order temporarily removing such person or persons pending a hearing. Such an order shall state its duration on its face and the words, "Temporary Order of Removal," and shall be effective upon issuance, for a period of 15 days, and may be extended once for a period of 15 days. A hearing must be held within 10 days of the expiration of a temporary order, or any extension thereof, at which time a temporary order may be dissolved or converted to a permanent order.

(c) Any removal pursuant to subsections (a) or (b) of this section shall be effective in all respects as if such removal had been made by the board of directors, the members or the stockholders of the association in question.

(d) Without the prior written approval of the Administrator, no director, officer or employee permanently removed pursuant to this section shall be eligible to be elected, reelected or appointed to any position as a director, officer

or employee of that association, nor shall such a director, officer or employee be eligible to be elected to or retain a position as a director, officer or employee of any other State association. (1981, c. 282, s. 3.)

§ 54B-70. Involuntary liquidation.

(a) The Administrator with prior approval of the Commission may take custody of the books, records and assets of every kind and character of any association organized and operated under the provisions of this Chapter for any of the purposes hereinafter enumerated, if it reasonably appears from examinations or from reports made to the Administrator that:

- (1) The directors, officers, or liquidators have neglected, failed or refused to take such action which the Administrator may deem necessary for the protection of the association, or have impeded or obstructed an examination; or
- (2) The withdrawable capital of the association is impaired to the extent that the realizable value of its assets is insufficient to pay in full its creditors and holders of withdrawable accounts; or its liquidity fund or general reserve account is impaired; or
- (3) The business of the association is being conducted in a fraudulent, illegal or unsafe manner, or that the association is in an unsafe or unsound condition to transact business; (any association which, except as authorized in writing by the Administrator, fails to make full payment of any withdrawal when due is in an unsafe or unsound condition to transact business, notwithstanding such provisions of the certificate of incorporation or such statutes or regulations with respect to payment of withdrawals in event an association does not pay all withdrawals in full); or
- (4) The officers, directors, or employees have assumed duties or performed acts in excess of those authorized by statute or regulation or charter, or without supplying the required bond; or,
- (5) The association has experienced a substantial dissipation of assets or earnings due to any violation or violations of statute or regulation, or due to any unsafe or unsound practice or practices; or
- (6) The association is insolvent, or is in imminent danger of insolvency or has suspended its ordinary business transactions due to insufficient funds; or
- (7) The association is unable to continue operations.

(b) Unless the Administrator finds that such an emergency exists which may result in loss to members, withdrawable account holders, stockholders, or creditors, and which requires that he take custody immediately, he shall first give written notice to the directors and officers specifying the conditions criticized and allowing a reasonable time in which corrections may be made before a receiver shall be appointed as outlined in subsection (d) below.

(c) The purposes for which the Administrator may take custody of an association include examination or further examination; conservation of its assets; restoration of impaired capital; the making of any reasonable or equitable adjustment deemed necessary by the Administrator under any plan of reorganization.

(d) If the Administrator after taking custody of an association, finds that one or more of the reasons for having taken custody continue to exist through the period of his custody, with little or no likelihood of amelioration of the situation, then he shall appoint as receiver or co-receiver any qualified person, firm or corporation for the purpose of liquidation of the association, which receiver shall furnish bond in form, amount and with surety as the Administrator may require. The Administrator may appoint the association's withdrawable account insurance corporation or its nominee as the receiver, and such insuring corporation shall be permitted to serve without posting bond.

(e) In the event the Administrator appoints a receiver for an association, he shall mail a certified copy of the appointment order by certified mail to the address of the association as it shall appear on the records of the Division, and to any previous receiver or other legal custodian of the association, and to any court or other authority to which such previous receiver or other legal custodian is subject. Notice of such appointment shall be published in a newspaper of general circulation in the county where such association has its principal office.

(f) Whenever a receiver for an association is appointed pursuant to subsection (d) above the association may within 30 days thereafter bring an action in the Superior Court of Wake County, for an order requiring the Administrator to remove such receiver.

(g) The duly appointed and qualified receiver shall take possession promptly of the association for which he or it has been so appointed, in accordance with the terms of such appointment, by service of a certified copy of the Administrator's appointment order upon the association at its principal office through the officer or employee who is present and appears to be in charge. Immediately upon taking possession of the association, the receiver shall take possession and title to books, records and assets of every description of such association. The receiver, by operation of law and without any conveyance or other instrument, act or deed, shall succeed to all the rights, titles, powers and privileges of the association, its members or stockholders, holders of withdrawable accounts, its officers and directors or any of them; and to the titles to the books, records and assets of every description of any previous receiver or other legal custodian of such association. Such members, stockholders, holders of withdrawable accounts, officers or directors, or any of them, shall not thereafter, except as hereinafter expressly provided, have or exercise any such rights, powers or privileges or act in connection with any assets or property of any nature of the association in receivership: Provided however, that any officer, director, member, stockholder, withdrawable account holder, or borrower of such association shall have the right to communicate with the Administrator with respect to such receivership. The Administrator, with the approval of the Commission, may at any time, direct the receiver to return the association to its previous or a newly constituted management. The Administrator may provide for a meeting or meetings of the members or stockholders for any purpose, including, without any limitation on the generality of the foregoing, the election of directors or an increase in the number of directors, or both, or the election of an entire new board of directors; and may provide for a meeting or meetings of the directors for any purpose including, without any limitation on the generality of the foregoing, the filling of vacancies on the board, the removal of officers and the election of new officers, or for any of such purposes. Any such meeting of members or stockholders, or of directors, shall be supervised or conducted by a representative of the Administrator.

(h) A duly appointed and qualified receiver shall have power and authority to:

- (1) Demand, sue for, collect, receive and take into his possession all the goods and chattels, rights and credits, moneys and effects, lands and tenements, books, papers, choses in action, bills, notes, and property of every description of the association;
- (2) Foreclose mortgages, deeds of trust, and other liens executed to the association to the extent the association would have had such right;
- (3) Institute suits for the recovery of any estate, property, damages, or demands existing in favor of the association, and he shall, upon his own application, be substituted as party plaintiff in the place of the association in any suit or proceeding pending at the time of his appointment;

- (4) Sell, convey, and assign all the property rights and interest owned by the association;
- (5) Appoint agents to serve at his pleasure;
- (6) Examine and investigate papers and persons, and pass on claims as provided in the regulations as prescribed by the Administrator;
- (7) Make and carry out agreements with the insuring corporation or with any other financial institution for the payment or assumption of the association liabilities, in whole or in part, and to sell, convey, transfer, pledge, or assign assets as security or otherwise and to make guarantees in connection therewith; and
- (8) Perform all other acts which might be done by the employees, officers and directors.

Such powers shall be continued in effect until liquidation and dissolution or until return of the association to its prior or newly constituted management.

(i) A receiver may at any time during the receivership and prior to final liquidation be removed and a replacement appointed by the Administrator.

(j) The Administrator may determine that such liquidation proceedings should be discontinued. He shall then remove the receiver and restore all the rights, powers, and privileges of its members and stockholders, customers, employees, officers and directors, or restore such rights, powers, and privileges to its members, stockholders and customers, and grant such rights, powers and privileges to a newly constituted management, all as of the time of such restoration of the association to its management unless another time for such restoration shall be specified by the Administrator. The return of an association to its management or to a newly constituted management from the possession of a receiver shall, by operation of law and without any conveyance or other instrument, act or deed, vest in such association the title to all property held by the receiver in his capacity as receiver for such association.

(k) A receiver may also be appointed under the authority of G.S. 1-502. No judge or court, however, shall appoint a receiver for any State association unless five days' advance notice of the motion, petition or application for appointment of a receiver shall have been given to such association and to the Administrator.

(l) Following the appointment of a receiver, the Administrator shall request the Attorney General to institute an action in the name of the Administrator in the superior court against the association for the orderly liquidation and dissolution of the association, and for an injunction to restrain the officers, directors and employees from continuing the operation of the association.

(m) Claims against a State association in receivership shall have the following order of priority for payment:

- (1) Costs, expenses and debts of the association incurred on or after the date of the appointment of the receiver, including compensation for the receiver;
- (2) Claims of general creditors;
- (3) Claims of holders of special purpose or thrift accounts;
- (4) Claims of holders of withdrawable accounts;
- (5) Claims of stockholders of a stock association;
- (6) All remaining assets to members and stockholders in an amount proportionate to their holdings as of the date of the appointment of the receiver.

(n) All claims of each class described within subsection (m) above shall be paid in full so long as sufficient assets remain. Members of the class for which the receiver cannot make payment in full because assets will be depleted during payment to such class shall be paid an amount proportionate to their total claims.

(o) The Administrator shall have the authority to direct the payment of claims for which no provision is herein made, and may direct the payment of

claims within a class. The Administrator shall have the authority to promulgate rules and regulations governing the payment of claims by an association in receivership.

(p) When all assets of the association have been fully liquidated, and all claims and expenses have been paid or settled, and the receiver shall recommend a final distribution, the dissolution of the association in receivership shall be accomplished in the following manner:

- (1) The receiver shall file with the Administrator a detailed report, in a form to be prescribed by the Administrator, of his acts and proposed final distribution, and dissolution.
- (2) Upon the Administrator's approval of the final report of the receiver, the receiver shall provide such notice and thereafter shall make such final distribution, in such manner as the Administrator may direct.
- (3) When a final distribution has been made except as to any unclaimed funds, the receiver shall deposit such unclaimed funds with the Administrator and shall deliver to the Administrator all books and records of the dissolved association.
- (4) Upon completion of the foregoing procedure, and upon the joint petition of the Administrator and receiver to the superior court, the court may find that the association should be dissolved, and following such publication of notice of dissolution as the court may direct, the court may enter a decree of final resolution and the association shall thereby be dissolved.
- (5) Upon final dissolution of the association in receivership or at such time as the receiver shall be otherwise relieved of his duties, the Administrator shall cause an audit to be conducted, during which the receiver shall be available to assist in such. The accounts of the receiver shall then be ruled upon by the Administrator and Commission and if approved, the receiver shall thereupon be given a final and complete discharge and release. (1981, c. 282, s. 3.)

§ 54B-71. Judicial review.

Any person or State association against whom a cease and desist order is issued or a fine is imposed may have such order or fine reviewed by a court of competent jurisdiction. Except as otherwise provided, an appeal may be made only within 30 days of the issuance of the order or the imposition of the fine, whichever is later. (1981, c. 282, s. 3.)

§ 54B-72. Indemnity.

No person who is fined or penalized for a violation of any criminal provision of this Article shall be reimbursed or indemnified in any fashion by the association for such fine or penalty. (1981, c. 282, s. 3.)

§ 54B-73. Cumulative penalties.

All penalties, fines, and remedies provided by this Article shall be cumulative. (1981, c. 282, s. 3.)

§ 54B-74. Annual license fees.

All State associations shall pay an annual license fee of twenty-five dollars (\$25.00) and may be licensed upon filing with the Administrator an application in such form as the Administrator may prescribe. Such license fee shall be used to defray the expenses incurred by the Division in supervising State associations. (1981, c. 282, s. 3.)

§ 54B-75. Statement filed by association; fees.

Every State association shall file in the office of the Administrator, on or before the first day of February in each year, in such form as the Administrator shall prescribe, a statement of the business standing and financial condition of such association on the preceding 31st day of December, signed and sworn to by the managing officer and secretary thereof before the Administrator, or before a notary public. The Administrator shall collect a fee of five dollars (\$5.00) from each association filing such statement, and the fees shall be paid into the State treasury to be credited to the general fund. (1981, c. 282, s. 3.)

§ 54B-76. Statement examined, approved, and published.

It shall be the duty of the Administrator to receive and thoroughly examine each annual statement required by G.S. 54B-75, and if made in compliance with the requirements thereof, each State association shall publish an abstract of the same in one of the newspapers of the State, to be selected by the managing officer making the statement, and at the expense of the association. (1981, c. 282, s. 3.)

§ 54B-77. Certain powers granted to State associations.

(a) In addition to the powers granted under this Chapter, any savings and loan association incorporated or operated under the provisions of this Chapter is herein authorized to:

- (1) Establish off the premises of any principal office or branch a customer communications terminal, point-of-sale terminal, automated teller machine, automated or other direct or remote information-processing device or machine, whether manned or unmanned, through or by means of which funds or information relating to any financial service or transaction rendered to the public is stored and transmitted, instantaneously or otherwise to or from an association terminal or terminals controlled or used by or with other parties; and the establishment and use of such a device or machine shall not be deemed to constitute a branch office and the capital requirements and standards for approval of a branch office as set forth in the statutes and regulations, shall not be applicable to the establishment of any such off-premises terminal, device or machine; and associations may through mutual consent share on-premises unmanned automated teller machines and cash dispensers. The Administrator may prescribe rules and regulations with regard to the application for permission for use, maintenance and supervision of said terminals, devices and machines;
- (2) Subject to such regulations as the Administrator may prescribe, a state-chartered association is authorized to issue credit cards, extend credit in connection therewith, and otherwise engage in or participate in credit card operations;
- (3) Subject to such regulations as the Administrator may prescribe, a state-chartered association may act as a trustee, executor, administrator, guardian or in any other fiduciary capacity permitted for federal savings and loan associations by the Congress of the United States, Federal Home Loan Bank Board and the Federal Savings and Loan Insurance Corporation;
- (4) a. In accordance with rules and regulations issued by the Administrator, mutual capital certificates may be issued by state-chartered associations and sold directly to subscribers or through underwriters, and such certificates shall constitute part of the general reserve and net worth of the issuing association.

The Administrator, in the rules and regulations relating to the issuance and sale of mutual capital certificates, shall provide that such certificates:

1. Shall be subordinate to all savings accounts, savings certificates, and debt obligations;
 2. Shall constitute a claim in liquidation on the general reserves, surplus and undivided profits of the association remaining after the payment of all savings accounts, savings certificates, and debt obligations;
 3. Shall be entitled to the payment of dividends; and
 4. May have a fixed or variable dividend rate.
- b. The Administrator shall provide in the rules and regulations for charging losses to the mutual capital certificate, reserves, and other net worth accounts. (1981, c. 282, s. 3.)

§§ 54B-78 to 54B-99: Reserved for future codification purposes.

ARTICLE 5.

Corporate Administration.

§ 54B-100. Membership of a mutual association.

The membership of a mutual association organized or operated under the provisions of this Chapter shall consist of:

- (1) Those who hold withdrawable accounts in an association; and
- (2) Those who borrow funds and those who become obligated on a loan from the association, for such time as the loan remains unpaid and the borrower remains liable to the association for the payment thereof.

Any person in his own right, or in a trust or other fiduciary capacity, or any partnership, association, corporation, political subdivision or public or governmental unit or entity may become a member of a mutual association. Members shall be possessed of such voting rights and such other rights as are provided by an association's certificate of incorporation and bylaws as approved by the Administrator. Members are the owners of a mutual association. (1981, c. 282, s. 3.)

§ 54B-101. Directors.

(a) The directors of a mutual association shall be elected by the members at an annual meeting, held pursuant to the terms of G.S. 54B-106, for such terms as the bylaws of the association may provide. Voting for directors shall be weighted according to the total amount of withdrawable accounts held by a member, subject to a maximum number of votes per member. Such requirements shall be fully prescribed in a detailed manner in the bylaws of the association.

(b) The directors of a stock association shall be elected by the stockholders at an annual meeting, held pursuant to the terms of G.S. 54B-106, for such terms as the bylaws of the association may provide. Voting for directors shall be weighted according to the number of shares of stock held by a stockholder. Such requirements shall be fully prescribed in a detailed manner in the bylaws of the association. (1981, c. 282, s. 3.)

§ 54B-102. Employment policies.

Employment policies appropriate for the transaction of the business of a State association may be set forth in the bylaws or established by resolution of the board of directors. (1981, c. 282, s. 3; 1981 (Reg. Sess., 1982), c. 1238, s. 22.)

Effect of Amendments. — The 1981 (Reg. Sess., 1982) amendment, rewrote this section to the extent that a detailed comparison is not here practical.

§ 54B-103. Duties and liabilities of officers and directors to their associations.

Officers and directors of a State association shall act in a fiduciary capacity towards the association and its members or stockholders. They shall discharge duties of their respective positions in good faith, and with that diligence and care which ordinarily prudent men would exercise under similar circumstances in like positions. (1981, c. 282, s. 3.)

§ 54B-104. Conflicts of interest.

Each director, officer and employee of a State association has a fundamental duty to avoid placing himself in a position which creates, or which leads to or could lead to a conflict of interest or appearance of a conflict of interest having adverse effects on the interests of members, customers or stockholders of the association, the soundness of the association, and the provision of economical home financing for this State. (1981, c. 282, s. 3.)

§ 54B-105. Voting rights.

Voting rights in the affairs of a State association may be exercised by members and stockholders by voting either in person or by proxy. The Administrator shall promulgate rules and regulations governing forms of proxies, holders of proxies and proxy solicitation. (1981, c. 282, s. 3.)

§ 54B-106. Annual meetings; notice required.

(a) Each association shall hold an annual meeting of its members or stockholders. The annual meeting shall be held at a time and place as shall be provided in the bylaws or determined by the board of directors.

(b) The board of directors of a mutual association shall cause to be published once a week for two weeks preceding such meeting, in a newspaper of general circulation published in the county where such association has its principal office, a notice of the meeting, signed by the association's secretary, and stating the time and place where it is to be held. In addition to the foregoing notice, each association shall disseminate additional notice of any annual meeting by notice made available to all members entering the premises of any office or branch of the association in the regular course of business by posting therein, in full view of the public and such members, one or more conspicuous signs or placards announcing the pending meeting, the time, date and place of the meeting and the availability of additional information. Printed matter shall be freely available to said members containing any information as may be prescribed in rules and regulations issued by the Administrator. Such additional notice shall be given at any time within the period of 60 days prior to and 14 days prior to the meeting and shall continue through the time of the meeting.

(c) The board of directors of a stock association shall cause a written or printed notice signed by the association's secretary, and stating the time and

place of the annual meeting to be delivered not less than 10 days nor more than 50 days before the date of the meeting, either personally or by mail to each stockholder of record entitled to vote at the meeting. If mailed, such notice shall be deemed to be delivered when deposited in the United States postal service addressed to the stockholder at his address as it appears on the record of stockholders of the corporation, with postage thereon prepaid. (1981, c. 282, s. 3.)

§ 54B-107. Special meetings; notice required.

(a) Special meetings of members or stockholders of an association may be called by the president or the board of directors or by such other officers or persons as may be provided for in the charter or bylaws of the association.

(b) Notice of any special meeting of members or stockholders shall be given in the same manner as provided for annual meetings under G.S. 54B-106. (1981, c. 282, s. 3.)

§ 54B-108. Quorum.

Unless otherwise provided in the association's charter or bylaws, 50 holders of withdrawable accounts in a mutual association or 50 stockholders or a majority of shares eligible to vote in a stock association, present in person or represented by proxy, shall constitute a quorum at any annual or special meeting. (1981, c. 282, s. 3.)

§ 54B-109. Indemnification.

(a) An association shall maintain a blanket indemnity bond of at least a minimum amount as prescribed by the Administrator.

(b) An association which employs collection agents, who for any reason are not covered by the bond as hereinabove required, shall provide for the bonding of each such agent in an amount equal to at least twice the average monthly collections of such agent. Such agents shall be required to make settlement with the association at least once monthly. No such coverage by bond will be required of any agent which is a bank insured by the Federal Deposit Insurance Corporation or an association insured by the Federal Savings and Loan Insurance Corporation or a mutual deposit guaranty association. The amount and form of such bonds and the sufficiency of the surety thereon shall be approved by the board of directors and the Administrator before such is valid. All such bonds shall provide that a cancellation thereof either by the surety or by the insured shall not become effective unless and until 30 days' notice in writing shall have been given to the Administrator.

(c) The Administrator may require every member of the board of directors, officer or employee of an association who shall knowingly make, approve, participate in, or assent to, or who knowingly shall permit any of the officers or agents of the association to make investments not authorized by this Chapter, to deposit with the association an indemnity bond, insurance or collateral of a kind and amount sufficient to indemnify the association against damage which the association or its members or stockholders sustain in consequence of such unauthorized investment.

(d) The amount considered sufficient to indemnify the association shall, in the case of an unauthorized loan, be the difference between the book value of the loan and the amount that could legally have been made under the provisions of this Chapter. The amount considered sufficient to indemnify the association shall, in the case of an unauthorized other investment, be the difference between the book value and the market value of the investment at the time when the Administrator makes his determination that such investment is

unauthorized. Whenever an unauthorized investment has been sold or disposed of without recourse, the Administrator shall release such part of the indemnity as remains after deducting any loss, which amount shall be retained by the association. Whenever the balance of an unauthorized loan has been reduced to an amount which would permit such loan to be made in compliance with the provisions of this Chapter, the indemnity shall be released. The Administrator, in making such determination may require an independent appraisal of the security.

(e) The Administrator shall cause to be examined annually all such bonds and pass on their sufficiency and either the board of directors or the Administrator may require new or additional bonds at any time.

(f) The Administrator is empowered to promulgate rules and regulations with respect to litigation expenses and other indemnity matters. (1981, c. 282, s. 3.)

§§ 54B-110 to 54B-120: Reserved for future codification purposes.

ARTICLE 6.

Withdrawable Accounts.

§ 54B-121. Creation of withdrawable accounts.

(a) Every State association shall be authorized to raise capital through the solicitation of investments from any person, natural or corporate, except as restricted or limited by law, or by such regulations as the Administrator may prescribe.

(b) Such funds obtained through the solicitation of investments shall be held by an association in accounts designated generally as withdrawable accounts.

(c) An association may establish as many classes of withdrawable accounts as may be provided for in its certificate of incorporation or bylaws, subject to such regulations and limitations as the Administrator may prescribe.

(1) At least one class of withdrawable accounts shall be established by which the holder, upon notice to the association, shall be able to withdraw the entire balance of such account without any penalty. The required period of notice, not to exceed 30 days, shall be determined by the board of directors of each association.

(2) For any additional classes of withdrawable accounts that may be established, the board may require a fixed minimum amount of money and a fixed minimum term, at the end of which, the account holder, without any notice on his part, shall be entitled to payment of the final balance of the funds in such account. Such minimum amount and minimum term and the rate of dividends on withdrawable accounts shall be agreed upon prior to the transfer to the association of any funds by the account holder and shall be evidenced by an executed contract.

a. An association may impose a penalty upon the holder of such account to be assessed at the time of any withdrawal from the account prior to the date of termination of the minimum term for which the account holder contracted.

b. An association may require that the holder of such an account provide the association with not less than 30 days' notice of an intended withdrawal prior to the date of the termination of the account contract.

c. When the date of termination of such an account is passed and the account is mature and payable, all payments thereon by the

- holder and all dividends on withdrawable account credits thereto by the association shall cease. However, if the holder shall notify the association, prior to the termination date of the account, that he wishes to extend the life of the account, the association shall renew the account and continue to accept payments and/or make dividends on withdrawable account credits or cancel the account as provided under the original contract.
- d. Unless the association receives notification within the proper time period and renews the account, then upon the date of termination, it shall either pay to the holder of the account the final value thereof, or mail a notice to the holder at his last address as it appears on the records of the association to the effect that he is entitled to receive payment for the account.
 - e. If the association does not make payment to the holder of the account upon the date of termination and instead mails a notice to him as provided in paragraph d above, then until such time as the holder is paid, the account shall earn dividends on withdrawable accounts at a rate not less than the rate which the association is paying on its account or accounts established under subdivision (1) above, unless provided otherwise by the account contract.
 - f. Whenever an association has funds in an amount insufficient to make immediate payment upon the date of termination of an account, or upon an application for withdrawal, the maturity shall be paid in accordance with the provisions of G.S. 54B-124. Whenever such a situation arises, dividends on withdrawable accounts shall be credited to the account at a rate not less than the rate provided for in the account contract. (1981, c. 282, s. 3; 1981 (Reg. Sess., 1982), c. 1238, s. 12.)

Effect of Amendments. — The 1981 (Reg. Sess., 1982) amendment, deleted the former last sentence of the first paragraph of subdivision (c)(2), which read: "Associations shall

mail to each natural person account holder, notification of the date of maturity of accounts at least 10 days prior to maturity."

§ 54B-122. Additional requirements.

Withdrawable accounts shall be:

- (1) Withdrawable upon demand, subject to the requisite advance notice to the association by the holder, as listed in G.S. 54B-121(c)(2)b and by such regulations as the Administrator may prescribe;
- (2) Entitled to dividends as provided herein or in such regulations as the Administrator may prescribe;
- (3) Evidenced by an executed contract setting forth any special terms and provisions applicable to the account and the conditions upon which withdrawal may be made. The form of such contract shall be subject to the prior approval of the Administrator and shall be held by the association as part of its records pertaining to the account. (1981, c. 282, s. 3; 1981 (Reg. Sess., 1982), c. 1238, s. 13.)

Effect of Amendments. — The 1981 (Reg. Sess., 1982) amendment deleted the former last sentence of subdivision (3), which read: "The

association shall issue to the holder of the account either an account book or certificate as evidence of ownership of the account."

§ 54B-123. Dividends on withdrawable accounts.

(a) An association shall compute and pay dividends on withdrawable accounts in accordance with such terms and conditions as are herein prescribed, and subject to additional limitation and restrictions as shall be set forth in its bylaws, or certificate of incorporation and resolutions of its board of directors.

(b) Notwithstanding any other provisions of the General Statutes, savings and loan associations shall not be limited in the amount of dividends they may pay on withdrawable accounts. The Administrator shall have the authority to insure that no association pays dividends on withdrawable accounts inconsistent with the association's continued solvency, and safe and proper operation. (1981, c. 282, s. 3.)

§ 54B-124. Withdrawals from withdrawable accounts.

(a) A withdrawable account holder may at any time make written application for withdrawal of all or any part of the withdrawal value thereof except to the extent the same may be pledged as security for a loan, as recorded by the association. The association shall number, date, and file every unpaid withdrawal application in the order of actual receipt.

(b) An association shall pay the total amount of the withdrawal value of a withdrawable account upon application from the holder of the account, except as otherwise provided in this section. Payment shall be made in full, without exception, to holders of withdrawable accounts whose withdrawable account totals one hundred dollars (\$100.00) or less.

(c) If an association has funds in the treasury and from current receipts in an amount insufficient to pay all long term withdrawable accounts which are mature and due and all applications for withdrawal, then within seven days after such accounts mature or payment is due, the board of directors of such association shall provide by resolution:

- (1) A statement of the amount of money available in each calendar month to pay maturities and withdrawals, in accordance with safe and required operating procedures; provided, that after making provision for expenses, debts, obligations and cash dividends on withdrawable accounts, not less than one hundred percent (100%) of the remainder of cash treasury funds and current receipts shall be made available for the payment of outstanding applications for withdrawal and maturities;
- (2) A list of matured withdrawable accounts in order of their maturity, and if in the same series, in order of issuance within such series; and a list of applications for withdrawal in order of actual receipt;
- (3) For a maximum sum, set by the Administrator which shall be paid to any one holder of a withdrawable account, for which a maturity or an application for withdrawal has not been paid, in any one month; and if the maturity or withdrawal due shall exceed the sum so fixed, then the holder shall be paid such sum in his turn according to the due date of the maturity or the filing date of the application; and his application shall be deemed refiled for payment in order in the next month; and such limited payment shall be made on a fixed date in each month for so long as any application or maturity remains unpaid.

(d) A withdrawable account pledged by the holder as sole security or partial security for a loan shall be subject to the withdrawal provisions of this section, but an application for withdrawal from such account shall be paid only if the resulting balance in such account would equal or exceed the outstanding loan balance, or portion thereof, secured by the withdrawable account. However, withdrawal of any additional amount from the account may be permitted,

provided that such payment of such withdrawal application shall be applied first to the outstanding balance of the loan.

(e) The contents of a withdrawable account may be accepted by an association in payment or partial payment for any real property or other assets owned by the association and being sold.

(f) The holder of a withdrawable account which is mature and payable or for which application for withdrawal has been made does not become a creditor of the association merely by reason of such payment due to him.

(g) Any such resolution adopted by an association's board of directors pursuant to this section shall be submitted to the Administrator for his approval or rejection. If he finds such to be fair to all affected parties, he shall approve it. If he determines otherwise, such resolution shall be rejected and the association shall not implement any of its provisions. The Administrator shall issue his findings within 10 days after receipt of the resolution.

(h) The membership in a mutual association of a withdrawable account holder who has filed an application for withdrawal or whose account is mature and due shall remain unimpaired for so long as any withdrawal value remains to his credit upon the books of the association.

(i) An association may not obligate itself to pay maturities and withdrawals under any provisions other than the ones set forth in this section without prior approval of the Administrator. (1981, c. 282, s. 3.)

§ 54B-125. Emergency limitations.

The Administrator, with the approval of the Governor, may impose a limitation upon the amounts withdrawable or payable from withdrawable accounts of State associations during any specifically defined period when such limitation is in the public interest and welfare. (1981, c. 282, s. 3.)

§ 54B-126. Forced retirement of withdrawable accounts.

(a) At any time that funds may be on hand and available for such a purpose, and the bylaws of an association and withdrawable account contracts so provide, an association shall have the authority and right to redeem all or any portion of its withdrawable accounts which have not been pledged as security for loans by forcing the retirement thereof. The number of and total amount of such withdrawable accounts to be retired by an association shall be determined by the board of directors.

(b) An association shall give notice by certified mail to the last address of each holder of an affected withdrawable account of at least 30 days. The redemption price of withdrawable accounts so retired shall be the full withdrawal value of the account, as determined on the last dividend date, plus all dividends on withdrawable accounts credited or paid as of the effective retirement date. Dividends shall continue to accrue and be paid or credited by the association to the withdrawable accounts to be retired up to and including the effective retirement date.

(c) If the required notice has been properly given, and if on the effective retirement date the funds necessary for payment have been set aside so as to be available, and shall continue to be available therefor, dividends on those withdrawable accounts called for forced retirement shall cease to accrue after the effective retirement date. All rights with respect to such account shall, after the effective retirement date, terminate, except only the right of the holder of the retired withdrawable account to receive the full redemption price.

(d) No association may redeem withdrawable accounts by forced retirement whenever it has on file applications for withdrawal, or maturities which have not yet been acted upon and paid. No association may redeem withdrawable accounts by forced retirement until the maturity of any fixed minimum term

which may be required for the class of withdrawable accounts to be retired. (1981, c. 282, s. 3.)

§ 54B-127. Negotiable orders of withdrawal.

Notwithstanding any other provisions of law, the Administrator shall by regulation, authorize associations to accept deposits to withdrawable accounts which may be withdrawn or transferred on or by negotiable or transferable order or authorization to the association. (1981, c. 282, s. 3.)

§ 54B-128. Option on nonnegotiable orders of withdrawal.

Notwithstanding any other provisions of law, the Administrator may by regulation authorize State associations to establish nonnegotiable orders or authorizations of withdrawal. (1981, c. 282, s. 3.)

§ 54B-129. Joint accounts.

(a) Any two or more persons may open or hold a withdrawable account or accounts. The withdrawable account and any balance thereof shall be held by them as joint tenants, with or without right of survivorship, as the contract shall provide. The withdrawable account may be held pursuant to G.S. 41-2.1 and have the incidents set forth in that section, provided, however, if the account is held pursuant to G.S. 41-2.1 the signature card shall set forth that fact. Unless otherwise agreed, payment by the association to any persons holding an account authorized by this section shall be a total discharge of the association's obligation as to the amount so paid. A pledge of such account by any holder or holders shall, unless otherwise specifically agreed upon, be a valid pledge and transfer of such account, or of the amount so pledged, and shall not operate to sever or terminate the joint ownership of all or any part of the account.

(b) Nothing herein contained shall be construed to repeal or modify any of the provisions of G.S. 105-24, relating to the administration of the estate tax laws of this State, or provisions of laws relating to estate taxes; nor shall the provisions herein contained regulate or limit the rights and liabilities of the parties having an interest in such withdrawable account as among themselves, but shall instead regulate, govern and protect the association in its relationship with such joint owners of withdrawable accounts as herein provided.

(c) No addition to such account, nor any withdrawal, payment or revocation shall affect the nature of the account as a joint account. (1981, c. 282, s. 3.)

§ 54B-130. Trust accounts.

(a) If any one or more persons holding or opening a withdrawable account shall execute a written agreement with the association, providing for the account to be held in the name of such person or persons as trustee or trustees for one or more persons designated as beneficiaries, the account and any balance thereof shall be held as a trust account, and unless otherwise agreed upon between the trustees and the association:

- (1) Any such trustee during his lifetime may change any designated beneficiaries by a written direction to the association; and
- (2) Any such trustee may withdraw or receive payment in cash or check payable to his personal order, and such payment or withdrawal shall constitute a revocation of the agreement as to the amount withdrawn; and

- (3) Upon the death of the surviving trustee, the person or persons designated as beneficiaries who are living at the death of the surviving trustee shall be the holder or holders of the account, as joint owners with right of survivorship if more than one, and payment by the association to the holder or any of them shall be a total discharge of the association's obligation as to the amount paid.

(b) If a person opening or holding a withdrawable account shall execute a written agreement with an association providing that, upon the death of the person named as holder, that the account shall be paid to or held by another designated person or persons, then the account and any balance thereof, shall be held as a payment on death account and unless otherwise agreed between the person executing such agreement and the association:

- (1) Upon the death of the holder of such a withdrawable account, the person designated by him and who has survived him shall be the owner of the account, and payment made by the association to any such person shall be a total discharge of the association's obligation as to the amount paid;
- (2) The person to whom such account is issued may change during his lifetime the designation of any of the persons who are to be holders of the account at his death by a written direction to the association; and
- (3) The person to whom such account is issued may withdraw or receive payment, and payment so made by the association shall be a total discharge of the association's liability as to the amount paid.

(c) Whenever no beneficiary of a trust account or no person designated to hold at death in a payment on death account survives the last trustee to die or the person to whom the payment on death account is issued, then the account and any balance thereof which exists shall be held by the trustee or holder of the payment on death account, in his own right and for his own use and benefit unless otherwise agreed upon prior to such death of the last beneficiary or person designated to hold at death.

(d) No addition to such accounts, nor any withdrawal, payment, revocation or change of beneficiary or payee shall affect the nature of such accounts as trust accounts or payment on death accounts. (1981, c. 282, s. 3.)

§ 54B-131. Right of setoff on withdrawable accounts.

Every association shall have a right of setoff, without further agreement or pledge, upon all withdrawable accounts owned by any member or customer to whom or upon whose behalf the association has made an unsecured advance of money by loan; and upon the default in the repayment or satisfaction thereof the association may, with 30 days notice to the member or customer, cancel on its books all or any part of the withdrawable accounts owned by such member or customer, and apply the value of such accounts in payment on account of such obligation. Any association may accept the pledge of withdrawable accounts in such association owned by a member or customer, other than the borrower as additional security for any loan secured by a withdrawable account or by a withdrawable account and real property, or as additional security for any real property loan. (1981, c. 282, s. 3.)

§ 54B-132. Minors as withdrawable account holders.

An association may issue a withdrawable account to a minor as the sole and absolute owner and receive payments, pay withdrawals, accept pledges and act in any other manner with respect to such account on the order of the minor with like effect as if he were of full age and legal capacity. Any payment to a minor shall be a discharge of the association to the extent thereof. The account shall be held for the exclusive right and benefit of the minor free from the control of all persons, except creditors. (1981, c. 282, s. 3.)

Legal Periodicals. — For article, "The Perspective of Fair Exchange," see 50 N.C.L. Contracts of Minors Viewed from the Rev. 517 (1972).

§ 54B-133. Withdrawable accounts as deposit of securities.

Notwithstanding any restrictions or limitations contained in any law of this State, the withdrawable accounts of any State association or of any federal association having its principal office in this State, may be accepted by any agency, department or official of this State in any case wherein such agency, department or official acting in its or his official capacity requires that securities be deposited with such agency, department or official. (1981, c. 282, s. 3.)

§ 54B-134. New account books.

A new account book or certificate or other evidence of ownership of a withdrawable account may be issued in the name of the holder of record at any time when requested by such holder or his legal representative upon proof satisfactory to the association that the original account book or certificate has been lost or destroyed. Such new account book or certificate shall expressly state that it is issued in lieu of the one lost or destroyed and that the association shall in no way be liable thereafter on account of the original book or certificate. The association may in its bylaws require indemnification against any loss that might result from the issuance of the new account book or certified certificate. (1981, c. 282, s. 3.)

§ 54B-135. Transfer of withdrawable accounts.

The owner of a withdrawable account may transfer his rights therein absolutely or conditionally to any other person eligible to hold the same but such transfer may be made on the books of the association only upon presentation of evidence of transfer satisfactory to the association, and accompanied by the proper application for transfer by the transferor and transferee, who shall accept such account subject to the terms and conditions of the savings contract, the bylaws of the association, the provisions of its certificate of incorporation, and all rules and regulations of the administrator. Notwithstanding the effectiveness of such a transfer between the parties thereto, the association may treat the holder of record of a withdrawable account as the owner thereof for all purposes, including payment and voting (in the case of a mutual association) until such transfer and assignment has been recorded by the association. (1981, c. 282, s. 3.)

§ 54B-136. Authority of power of attorney.

An association may continue to recognize the authority of an individual holding a power of attorney in writing to manage or to make withdrawals either in whole or in part from the withdrawable account of a customer or member until it receives written or actual notice of death or of adjudication of incompetency of such member or revocation of the authority of such individual holding such power of attorney. Payment by the association to an individual holding a power of attorney prior to receipt of such notice shall be a total discharge of the association's obligation as to the amount so paid. (1981, c. 282, s. 3.)

§§ 54B-137 to 54B-146: Reserved for future codification purposes.

ARTICLE 6A.

Fee for Returned Checks.

§ 54B-147. Collection of processing fee for returned checks.

Notwithstanding any other provision of law, a processing fee, not to exceed ten dollars (\$10.00), may be charged and collected by any association for checks (including negotiable orders of withdrawals drafts) on which payment has been refused by the payor depository institution because of insufficient funds or because the drawer did not have an account at that depository institution. An association may also collect said fee for checks drawn on that association with respect to an account with insufficient funds. (1981 (Reg. Sess., 1982), c. 1238, s. 14.)

§§ 54B-148, 54B-149: Reserved for future codification purposes.

ARTICLE 7.

Loans.

§ 54B-150. Manner of making loans.

(a) The bylaws of an association shall provide for procedures by which loans are to be considered, approved and made by the association.

(b) All actions on loan applications to the association shall be reported to the board of directors at its next meeting. (1981, c. 282, s. 3.)

Cross References. — As to parity of interest rates for savings and loan associations, see § 24-1.4. As to loans on mortgages, etc., issued under the Federal Housing Act, see § 53-45.

§ 54B-151. Permitted loans.

(a) An association may lend funds on the sole security of pledged withdrawable accounts, but no loan so made shall exceed the withdrawal value of the pledged account. However, no such loan shall be made when an association has applications for withdrawals or maturities which have not been paid.

(b) An association may lend funds on the security of real property:

- (1) Of such value, determined in accordance with the provisions of this Chapter and the rules and regulations concerning appraisals, sufficient to provide good and ample security for the loan; and
- (2) Which has a fee simple title, totally free from encumbrances except as permitted within this Article; or
- (3) Which has a leasehold title extending or renewable automatically or at the option of the holder or at the option of the association for a period of at least 10 years beyond the maturity of the loan; and
- (4) Which has a clear title established by such evidence of title as is consistent with sound lending practices; and
- (5) Where the security interest in such real property is evidenced by an appropriate written instrument creating or constituting a first and prior lien on real property, and the loan is evidenced by a note, bond or similar written instrument; or

- (6) Where the security interest in such real property is evidenced by an appropriate written instrument creating or constituting a second or junior lien on real property which is subject only to a mortgage or deed of trust securing a commercial loan or a residential loan made by the association or another lender; and
 - (7) Where the security property may be subject also to taxes and special assessments not yet due and payable.
- (c) An association may lend funds on the security of the whole of the beneficial interest in a trust in which the trust property consists of real property of the type upon which a loan would be permitted under G.S. 54B-151(b).
- (d) An association may lend funds on the security of bonds issued as general obligations of or guaranteed by the United States, bonds issued as general obligations of this State, and bonds issued as general obligations of any county, city, town, village, school district, sanitation or park district, or other political subdivision or municipal corporation of this State. The amount of such loan made under the authority of this subsection shall not exceed ninety percent (90%) of the face value of the bonds which serve as security.
- (e) An association may invest in construction loans, the proceeds of which, under the terms of a written contract between a lender and a borrower, are to be disbursed periodically as such construction work progresses. Such loans may include advances for the purchase price of the real property upon which such improvements are to be constructed. Any construction loan may be converted into a loan with permanent financing, and the term of the permanent financing shall be considered to begin at the end of the term allowed for construction.
- (f) An association may lend funds without requiring security. No unsecured loan shall exceed the maximum amount authorized by regulation by the Administrator.
- (g) An association may invest in loans secured by a lien on unimproved real property.
- (h) An association may invest in loans secured by the cash surrender value of any life insurance policy on the life of the borrower. However, the amount of such loan shall in no event exceed ninety percent (90%) of the cash surrender value of such life insurance policy.
- (i) An association may invest in loans, obligations and advances of credit made for the payment of expenses of college or university education. Such loans may be secured, partly secured or unsecured, and the association may require a comaker or comakers, an insurance guarantee under a governmental student loan guarantee plan, or other protection against contingencies. The borrower shall certify to the association that the proceeds of the loan are to be used by a full-time student solely for the payment of expenses of college or university education or industrial education center, technical institute or community college education.
- (j) An association may lend funds on any collateral deemed sufficient by the board of directors to properly secure loans; however, if the collateral consists of stock or equity securities of any kind, the stock or securities must be listed on a national stock exchange or regularly quoted and offered for trade on an over-the-counter market.
- (k) An association may lend funds on the security of a mobile home subject to such rules and regulations governing such loans as may be promulgated by the Administrator. (1981, c. 282, s. 3.)

§ 54B-152. Real property encumbrances.

- (a) Real property is deemed encumbered within the meaning of this Chapter unless the security instrument thereon establishes a first lien upon such real property or interest therein.

(b) Notwithstanding the provisions of the immediately preceding subsection, real property is not deemed encumbered within the meaning of this Chapter merely by reason of the existence of:

- (1) An instrument reserving a right-of-way, sewer rights, or rights in wells; or
- (2) Building restrictions or other restrictive covenants; or
- (3) A lease under which rents or profits are reserved by the owner; or
- (4) Current taxes or assessments not yet payable; or
- (5) Other encumbrances which, in accordance with sound lending practices in the locality, are not regarded as constituting defects in title to real property. (1981, c. 282, s. 3.)

§ 54B-153. Prohibited security.

No association may accept its own capital stock or its own mutual capital certificates as security for any loan made by such association. (1981, c. 282, s. 3.)

§ 54B-154. Insider loans.

(a) As used in this section, the term:

- (1) "Company" means any corporation, partnership, limited partnership, business or voting trust, association other than a State association, joint venture, pool syndicate, sole proprietorship, unincorporated organization, or any other form of business entity or trust excepting only corporations owned by the United States or a state.
- (2) "Control" means that a person:
 - a. Directly or indirectly, or acting through other persons or associates, owns, influences, directs, or has the power to vote more than twenty-five percent (25%) of any class of voting securities of a company;
 - b. Directs, influences, or has the power to vote the election of a majority of the directors of a company;
 - c. Has the power, directly or indirectly, to exercise a controlling or directing influence over the management or policies of a company.

(b) Except as provided in subsection (c) of this section, a State association shall not make any loan or extension of credit to any director, officer, member of the immediate family of such persons, or company controlled by such persons.

(c) A State association may make a loan or extension of credit to any director, officer, member of the immediate family of such persons, or company controlled by such persons where the loan or extension of credit is made in the ordinary course of business of the association and does not involve a more than normal risk of collectibility or present other unfavorable terms to the association. Such loan or extension of credit shall be limited to the following categories:

- (1) Loans secured by a single-family dwelling owned and occupied by the borrower as his principal residence;
- (2) Loans, in the aggregate not exceeding an amount specified by the rules and regulations, for adding to, improving, altering, repairing, or furnishing a single-family dwelling owned and occupied by the borrower as his principal residence;
- (3) Loans secured by a mobile home owned and occupied by the borrower as his principal residence;
- (4) Loans secured by withdrawable accounts maintained by the borrower at the association;

- (5) Loans, in the aggregate not exceeding an amount specified by the rules and regulations, for payment of educational expenses;
- (6) Consumer loans, in the aggregate not exceeding an amount specified by the rules and regulations, which may be made only to natural persons, and which must comply with the association's consumer loan underwriting standards and procedures; and
- (7) Loans or extensions of credit specifically related to credit cards, negotiable order of withdrawal accounts and noninterest bearing negotiable order of withdrawal accounts. Such loans in the aggregate shall not exceed an amount specified in the rules and regulations.

(d) Each loan or extension of credit made under this section to any director, officer, member of the immediate family of such persons, or company controlled by such persons shall be approved by a resolution of the board of directors containing a full disclosure. Such resolution shall be approved by an affirmative vote of at least two thirds of the directors of the association with any interested directors taking no part in the appraisal of the security property or in such vote. For purposes of this section, "full disclosure" shall mean disclosure as to whether the loan or extension of credit is made on substantially the same terms (including interest rate and collateral) as those for loans or extensions of credit to the general public. With respect to loans made under subdivision (7) of subsection (c) of this section, the resolution shall be adopted with respect to the initial establishment of a line of credit and any increase in such line of credit, but need not be adopted for each extension of credit. Further the resolution need not be adopted for loans made under subdivision (6) of subsection (c) of this section. (1981, c. 282, s. 3.)

§ 54B-155. Rule-making power of Administrator.

The Administrator shall, from time to time, promulgate such rules and regulations in respect to loans permitted to be made by State associations as may be reasonably necessary to assure that such loans are in keeping with sound lending practices and to promote the purposes of this Chapter; provided, that such rules and regulations shall not prohibit an association from making any loan which is a permitted loan for federal associations under federal regulatory authority. (1981, c. 282, s. 3.)

§ 54B-156. Loan expenses and fees.

(a) Subject to the provisions of N.C.G.S. Chapter 24, an association may require borrowers to pay all reasonable expenses incurred by the association in connection with making, closing, disbursing, extending, adjusting or renewing loans. Such charges may be collected by the association from the borrower and paid to any persons, including any director, officer or employee of the association who may render services in connection with the loan, or such charges may be paid directly by the borrower.

(b) An association may require a borrower to pay a reasonable charge for late payments made during the course of repayment of a loan. Subject to the provisions of G.S. 24-10(e) and (f), such payments may be levied only upon such terms and conditions as shall be fixed by the association's board of directors and agreed to by the borrower in the loan contract. (1981, c. 282, s. 3.)

Cross References. — As to interest and usury laws in general, see § 24-1 et seq.

CASE NOTES

Editor's Note. — The cases cited below were decided under former statutory provisions.

Application of Usury Laws to Building and Loan Associations. — See *Mills v. Salisbury Bldg. & Loan Ass'n*, 75 N.C. 292 (1876); *Commissioners of Craven v. Atlantic & N.C.R.R.*, 77 N.C. 289 (1877); *Dickerson v. Raleigh Co-op. Land & Bldg. Ass'n*, 89 N.C. 37 (1883); *Rowland v. Old Dominion Bldg. & Loan Ass'n*, 115 N.C. 825, 18 S.E. 965 (1894); *Rowland v. Old Dominion Bldg. & Loan Ass'n*,

116 N.C. 877, 22 S.E. 8 (1895); *Meroney v. Atlanta Bldg. & Loan Ass'n*, 116 N.C. 882, 21 S.E. 924 (1895); *Rowland v. Old Dominion Bldg. & Loan Ass'n*, 118 N.C. 173, 24 S.E. 266 (1896); *Smith v. Old Dominion Bldg. & Loan Ass'n*, 119 N.C. 249, 26 S.E. 41 (1896); *Hollowell v. Southern Bldg. & Loan Ass'n*, 120 N.C. 286, 26 S.E. 781 (1897); *Williams v. Maxwell*, 123 N.C. 586, 31 S.E. 821 (1898); *Cheek v. Iron Belt Bldg. & Loan Ass'n*, 126 N.C. 242, 35 S.E. 463 (1900).

§ 54B-157. Loans conditioned on certain transactions prohibited.

No association or service corporation thereof shall require as a condition of making a loan that the borrower contract with any specific person or organization for particular services. (1981, c. 282, s. 3.)

§ 54B-158. Insured or guaranteed loans.

An association may make insured or guaranteed loans in accordance with the provisions of G.S. 53-45. (1981, c. 282, s. 3.)

§ 54B-159. Purchase of loans.

An association may invest any funds on hand in the purchase of loans of a type which the association could make in accordance with the provisions of this Chapter. (1981, c. 282, s. 3.)

§ 54B-160. Participation in loans.

An association may invest in a participating interest in loans of a type which the association would be authorized to originate. (1981, c. 282, s. 3; 1981 (Reg. Sess., 1982), c. 1238, s. 15.)

Effect of Amendments. — The 1981 (Reg. Sess., 1982) amendment, deleted, at the end of the section, a proviso reading "provided, that the other participants are instrumentalities of

or corporations owned solely or in part by the United States or this State, or are State associations, or are federal associations, or are service corporations of State or federal associations."

§ 54B-161. Sale of loans.

An association may sell any loan, including any participating interest in a loan. (1981, c. 282, s. 3; 1981 (Reg. Sess., 1982), c. 1238, s. 16.)

Effect of Amendments. — The 1981 (Reg. Sess., 1982) amendment, deleted "without recourse" preceding "and loan" and substituted "in a loan" for "therein" at the end of the present section and deleted the former second sentence of the section, which read: "Loans may

be assigned or pledged with recourse to any Federal Home Loan Bank or any mutual deposit guaranty association of which the association is a member or to any bank as a requirement of borrowing."

§ 54B-162. Power to borrow money.

An association, in its certificate of incorporation or in its bylaws, may authorize the board of directors to borrow money and the board of directors may by resolution adopted by a vote of at least two thirds of the entire board duly recorded in the minutes may authorize the officers of the association to borrow money for the association on such terms and conditions as it may deem proper. (1981, c. 282, s. 3; 1981 (Reg. Sess., 1982), c. 1238, s. 17.)

Effect of Amendments. — The 1981 (Reg. Sess., 1982) amendment deleted “provided, that the total amount of money borrowed shall at no time exceed fifty percent (50%) of the gross assets of the association” at the end of the present single sentence of the section and

deleted the former second sentence of the section, which authorized an association to borrow without limit from agencies or instrumentalities of the United States or the State or from mutual deposit guaranty associations.

§ 54B-163. Methods of loan repayment.

Subject to such rules and regulations as the Administrator may prescribe, an association shall agree in writing with borrowers as to the method or plan by which an indebtedness shall be repaid. (1981, c. 282, s. 3.)

§ 54B-164. Loans to one borrower.

The aggregate amount of mortgage loans outstanding granted by an association to any one borrower shall not exceed ten percent (10%) of the net withdrawal value of such association’s withdrawable accounts or an amount equal to the total net worth of such association, whichever amount is less. (1981, c. 282, s. 3.)

§ 54B-165. Professional services.

(a) A State association or service corporation thereof must notify borrowers prior to the loan commitment of their right to select the attorney or law firm rendering legal services in connection with the loan, and the person or organization rendering insurance services in connection with the loan. Such persons or organizations must be approved by the association’s board of directors, pursuant to such rules and regulations as the Administrator may prescribe.

(b) A State association or service corporation thereof may require borrowers to reimburse such association for legal services rendered to it by its own attorney only when the fee is limited to legal services required by the making of such loan. (1981, c. 282, s. 3.)

§ 54B-166. Nonconforming investments.

Unless otherwise provided, every loan or other investment made in violation of this Chapter shall be due and payable according to its terms and the obligation thereof shall not be impaired; provided, that such violation consists only of the lending of an excessive sum on authorized security or of investing in an unauthorized investment. (1981, c. 282, s. 3.)

§ 54B-167. Scope of Article.

Nothing in this Article shall be construed to modify Chapter 24 of the General Statutes, or other applicable law, or to allow fees, charges, or interest beyond that permitted by Chapter 24 or other applicable law. (1981, c. 282, s. 3.)

§§ 54B-168 to 54B-179: Reserved for future codification purposes.

ARTICLE 8.

Other Investments.

§ 54B-180. Other investments.

In addition to the loans and investments permitted under Article 7 of this Chapter, the assets of a State association in excess of the demands of its members or customers may be invested subject to the approval of the board of directors only as described under the provisions of this Article. (1981, c. 282, s. 3.)

§ 54B-181. Business property of a State association.

A State association may invest in real property and equipment necessary for the conduct of its business and in real property to be held for its future use. Such association may invest in an office building or buildings, and appurtenances for the purpose of the transaction of such association's business or for rental. No such investment may be made without the prior written approval of the Administrator if the total amount of such investments exceeds the association's net worth. (1981, c. 282, s. 3.)

§ 54B-182. United States obligations.

A State association may invest in any obligation issued and fully guaranteed in principal and interest by the United States government or any instrumentality thereof. (1981, c. 282, s. 3.)

Cross References. — As to investment in bonds guaranteed by United States, see § 53-44.

§ 54B-183. North Carolina obligations.

A State association may invest in any obligation issued and fully guaranteed in principal and interest by the State of North Carolina or any instrumentality thereof. (1981, c. 282, s. 3.)

§ 54B-184. Federal Home Loan Bank obligations.

A State association may invest in the stock of the Federal Home Loan Bank of which such association is a member, and in bonds or other evidences of indebtedness or obligation of any Federal Home Loan Bank. (1981, c. 282, s. 3.)

§ 54B-185. Deposits in banks.

A State association may invest in certificates of deposit, time insured deposits, savings accounts, or demand deposits of such banks as are approved by the board of directors of the association. (1981, c. 282, s. 3.)

§ 54B-186. Deposits in other associations.

A State association may invest in withdrawable accounts of any association as approved by the board of directors. (1981, c. 282, s. 3; 1981 (Reg. Sess., 1982), c. 1238, s. 18.)

Effect of Amendments. — The 1981 (Reg. Sess., 1982) amendment, substituted "any association as approved by the board of directors" for "any State association, or of any federal association having its principal office within this State, up to an amount equal to the amount of insurance coverage on such association's withdrawal accounts by either the Federal Savings and Loan Insurance Corporation or by a mutual deposit guaranty association organized or operated pursuant to Article 12 of this Chapter."

§ 54B-187. Federal National Mortgage Association obligations.

A State association may invest in stock or other evidences of indebtedness or obligations of the Federal National Mortgage Association, or any successor thereto. (1981, c. 282, s. 3.)

§ 54B-188. Municipal and county obligations.

A State association may invest in bonds or other evidences of indebtedness which are direct general obligations of any county, city, town, village, school district, sanitation or park district, or other political subdivision or municipal corporation of this State; or in bonds or other evidences of indebtedness which are payable from revenues or earnings specifically pledged therefor, which are issued by the county or an adjoining county or a political subdivision or municipal corporation of a county in this State. (1981, c. 282, s. 3.)

§ 54B-189. Stock in education agency.

A State association may invest in stock or obligations of any corporation doing business in this State, or of any agency of this State or of the United States, where the principal business of such corporation or agency is to make loans for the financing of a college or university education, or education at an industrial education center, technical institute or community college in this State. (1981, c. 282, s. 3.)

§ 54B-190. Industrial development corporation stock.

A State association may invest in stock or other evidence of indebtedness or obligations of business or industrial development corporations chartered by this State or by the United States. (1981, c. 282, s. 3.)

§ 54B-191. Urban renewal investment corporation stock.

A State association may invest in stock or other evidence of indebtedness or obligations of an urban renewal investment corporation chartered under the laws of this State or of the United States. (1981, c. 282, s. 3.)

§ 54B-192. Urban renewal projects.

(a) A State association may invest in the initial purchase and development, or the purchase or commitment to purchase after completion, of unimproved residential real property or improved residential real property for sale or rental, including projects for the reconstruction, rehabilitation or rebuilding of

residential properties to meet the minimum standards of health and occupancy prescribed by appropriate local authorities, and the provision of accommodations for retail stores, shops and other community services which are reasonably incident to such housing projects. No such investment shall be made under the provisions of this section without the prior approval of the Administrator. The Administrator may approve such investment under the provisions of this section only when the association shows:

- (1) That the association has adequate assets available for such an investment;
 - (2) That the amount of the proposed investment does not exceed ninety percent (90%) of the reasonable market value of the property or interest therein; and
 - (3) Reserved.
 - (4) That the proposed project is to be located in an area, including any contiguous area acquired incidentally thereto, determined by the Administrator to be an urban renewal, redevelopment, blighted or conservation area, or any similar area provided for by the laws of this State or of the United States, or local ordinances for slum clearance, conservation, blighted area clearance, redevelopment, urban renewal or of a similar nature or purpose.
- (b) Nothing herein contained shall prohibit a State association from developing or building on land acquired by it under any other provisions of this Chapter; nor shall a State association be prohibited from completing the construction of buildings pursuant to any construction loan contract where the borrower has failed to comply with the terms of such contract. (1981, c. 282, s. 3.)

§ 54B-193. Loans on sufficient collateral; other investments.

(a) A State association may invest in loans secured by any collateral deemed sufficient by the board of directors to properly secure loans; however, if the collateral consists of stock or equity securities of any kind, the stock or securities must be listed on a national stock exchange or regularly quoted and offered for trade on an over-the-counter market.

(b) Subject to such limitations as the Administrator may prescribe by regulation, a State association may invest in any investment deemed appropriate by its board of directors. (1981, c. 282, s. 3; 1981 (Reg. Sess., 1982), c. 1238, s. 19.)

Effect of Amendments. — The 1981 (Reg. Sess., 1982) amendment, designated the original section as subsection (a) and added subsection (b).

§ 54B-194. Service corporations.

(a) Any association or group of associations whose principal offices are located within this State, may establish service corporations under the provisions of Chapter 55 for corporate organization, provided that the Administrator receives copies of the proposed articles of incorporation and bylaws for approval, prior to filing them with the Secretary of State. Any such association may also invest in the capital stock, obligations or other securities of existing service corporations.

(b) No State association may make any investment in service corporations if its aggregate investment would exceed ten percent (10%) of its total assets.

(c) Service corporations shall be subject to audit and examination by the Administrator, and the cost of examination shall be paid by the service corporation.

(d) The permitted activities of a service corporation shall be described in the rules and regulations as promulgated by the Administrator. In addition, a service corporation may engage in those activities which are approved by the Federal Home Loan Bank Board for service corporations owned solely by federal associations who have their principal offices in this State, unless such activities are prohibited by the Administrator.

(e) The location of the principal and branch offices of a service corporation must be approved by the Administrator. (1981, c. 282, s. 3; 1981 (Reg. Sess., 1982), c. 1238, s. 20.)

Effect of Amendments. — The 1981 (Reg. Sess., 1982) amendment, substituted "ten percent (10%)" for "five percent (5%)" in subsection (b).

§ 54B-195. Any loan or investment permitted for federal associations.

Subject to such limitations and restrictions as the Administrator may prescribe through rules and regulations, any State association is authorized and permitted to make any loan or investment which may be permitted by the Federal Home Loan Bank Board, the Federal Savings and Loan Insurance Corporation, and the United States Congress for federal associations whose principal offices are located within this State. Every loan or investment made by a State association prior to the enactment of this Chapter shall for all purposes be considered to have been permitted loans or investments if federal associations were authorized to make such loans or investments at the time they were made by the State association. (1981, c. 282, s. 3.)

§ 54B-196: Reserved for future codification purposes.

Editor's Note. — The section enacted as § 54B-196 by Session Laws 1981, c. 282, has been codified as § 24-1.4.

§ 54B-197. Effect of change in law or regulation.

Any loan or investment made by a State association which was in compliance with the law or regulations in effect at the time such loan or investment was made will remain a legal loan or investment even though the power to make such loans or investments in the future is amended or revoked. (1981, c. 282, s. 3.)

§§ 54B-198 to 54B-209: Reserved for future codification purposes.

ARTICLE 9.

Liquidity Fund.

§ 54B-210. Components of liquidity fund.

Every State association shall at all times have on hand and unpledged, cash, investments in obligations of the United States government, or the government of the State of North Carolina, or stock in the Federal Home Loan Bank, or deposits in any mutual deposit guaranty association organized or operated pursuant to Article 12 of this Chapter, or bonds issued by the Federal Home

Loan Bank, or Government National Mortgage Association pass-through certificates, or Federal Home Loan Mortgage Corporation pass-through certificates, or funds on deposit in a federal reserve bank or in other bank or banks as may have been approved by a majority of the entire board of directors, in an amount set by the Commission equal to at least four percent (4%) of the net withdrawal value of the association's withdrawable account, or two hundred fifty thousand dollars (\$250,000), whichever is greater, as the liquidity fund and held to assure the liquidity of such association. Such investments and funds on deposit shall be readily marketable and shall not exceed a term of five years. (1981, c. 282, s. 3; 1981 (Reg. Sess., 1982), c. 1238, s. 21.)

Effect of Amendments. — The 1981 (Reg. Sess., 1982) amendment, inserted "or Government National Mortgage Association

pass-through certificates, or Federal Home Loan Mortgage Corporation pass-through certificates," near the middle of the first sentence.

§ 54B-211. Renewal of liquidity fund.

If the liquidity fund falls below the amount required by the Commission, the association shall make no new real property loans until the required level has been attained. The refinancing, recasting or renewal of loans previously made and loans made as a result of foreclosure sales under instruments held by the association shall not be considered as new loans, within the meaning of this section. (1981, c. 282, s. 3.)

§§ 54B-212 to 54B-215: Reserved for future codification purposes.

ARTICLE 10.

General Reserve.

§ 54B-216. General reserve.

(a) Every State association shall establish and maintain a general reserve for the sole purpose of covering losses. The general reserve shall be established and maintained separately from any specific loss reserves established and maintained at the election of the association or pursuant to rules and regulations prescribed by the Commission.

(b) The general reserve shall be maintained at a level set by the Commission based on assets. In setting the level for the general reserve, the Commission shall evaluate the risk attributable to various types of assets and shall establish percentages for each type of asset based on its level of risk.

(c) In the case of newly chartered stock associations, the permanent capital reserve required by G.S. 54B-12(b)(2) shall be deemed a constituent part of and not supplementary to the general reserve required by this section. Therefore, a minimum of five hundred thousand dollars (\$500,000) shall be the required level of the general reserve of a stock association until a greater level is required pursuant to this section and rules and regulations promulgated thereto.

(d) Notwithstanding the provision of this section, any State association which has insurance of withdrawable accounts with the Federal Savings and Loan Insurance Corporation and which meets the statutory reserve requirement of the Federal Savings and Loan Insurance Corporation need not comply with the general reserve requirement of this section.

(e) The failure of a State association to maintain the required level of general reserve set by the Commission or the statutory reserve requirement of

the Federal Savings and Loan Insurance Corporation may be grounds for supervisory action by the Administrator.

(f) The Commission shall adopt rules and regulations for the implementation of this section. (1981, c. 282, s. 3; 1981 (Reg. Sess., 1982), c. 1238, s. 2.)

Effect of Amendments. — The 1981 (Reg. Sess., 1982) amendment, so changed this section that a detailed comparison is not here practical.

§§ 54B-217 to 54B-220: Reserved for future codification purposes.

ARTICLE 11.

Foreign Associations.

§ 54B-221. Allowed to do business.

A corporation or association chartered by another state to conduct the savings and loan business may be certified by this State for the purpose of conducting the business of a savings and loan association in the manner hereinafter provided. Unless so certified, no foreign association shall conduct a savings and loan business in this State. (1981, c. 282, s. 3.)

§ 54B-222. Application by a foreign association.

Application by a foreign association to conduct a savings and loan business in this State shall be made to the Administrator. Upon making such application, the association shall file with the Administrator two certified copies of its charter or certificate of incorporation, and bylaws, and thereafter certified copies of all amendments thereto; the names and addresses of its officers and directors; and a report of its condition, in such form as may be prescribed by the Administrator, which shall be verified by oath of such officers and other persons as the Administrator shall designate. The Administrator may call for additional reports. (1981, c. 282, s. 3.)

§ 54B-223. Certificate of authority to enter State.

If the Administrator finds that the association has good assets of sufficient value to cover all its liabilities and that its methods of doing business are safe and not contrary to the laws governing associations in this State, it may be permitted to conduct the business of a savings and loan association in this State upon a certificate of authority to enter, which shall be issued by the Administrator only when such association shall have complied with the further requirements of this Article. The Administrator shall have the authority to conduct, or cause to be conducted, an examination and investigation, upon the premises of the association as a prerequisite to the issuance of a certificate of authority to enter. Such certificate of authority to enter must be renewed annually for so long as such foreign association desires to operate within this State. Renewal may occur upon payment by the association of the appropriate renewal fee and a determination by the Administrator of the association's continued fitness to operate within this State. (1981, c. 282, s. 3.)

§ 54B-224. Deposit of securities.

The Administrator, prior to issuing a certificate of authority to enter, shall require every such foreign association to deposit with the Administrator such securities as he may approve, amounting to at least thirty thousand dollars (\$30,000). These securities shall be held by him in trust for the exclusive benefit and security of the creditors and withdrawable account holders of the foreign association who are resident in this State and he shall have authority to require it to deposit additional securities at any time. No change or transfer of such securities shall be made without his consent. Such deposit of securities shall be maintained intact at all times in the full sum required, but the association making such deposit, so long as it shall continue solvent and in compliance with all the provisions of this Chapter applicable to it, may receive the dividends or interest on the securities deposited, and may from time to time, with the approval of the Administrator withdraw any such securities upon depositing with the Administrator other like securities the market value of which shall be equal to such as may be withdrawn. (1981, c. 282, s. 3.)

§ 54B-225. Appointment of Administrator as attorney.

The certificate of authority to enter shall be for the current calendar year only. It shall not be issued until the association shall by a duly executed instrument filed with the Administrator, constitute as its true and lawful attorney the Administrator and his successors in office, upon whom all original process in any action or legal proceedings against it may be served, and therein shall agree that any original process against it which may be served upon the Administrator shall be of the same force and validity as if served on the association itself, and that the authority thereof shall continue in force irrevocable so long as any liability of the association remains outstanding in this State. Such service of process shall be made by leaving a copy of same in the office of the Administrator along with a fee of two dollars (\$2.00) to be taxed in the plaintiff's costs. When any original process is thus served, the Administrator, by letter directed to the secretary of the association, shall within two days after such service forward to the secretary a copy of the process served upon him, and such service shall be deemed sufficient service upon the association. The Administrator shall keep a record of all such process showing the day and hour of such service. (1981, c. 282, s. 3.)

§ 54B-226. Certificate required for agent.

No person may solicit business for, nor act as agent for any foreign association doing business in North Carolina without having first procured from the Administrator a certificate stating that the association for which he offers to act is duly certified by this State to do business in the year in which such person solicits business or offers to act as agent. The Administrator shall be paid a fee of one dollar (\$1.00) for issuing the certificate, to be paid by the association for which the same was issued. Any person violating the provisions of this section shall be guilty of a misdemeanor. (1981, c. 282, s. 3.)

§ 54B-227. Fees and expenses.

Every such association shall pay for filing two certified copies of its certificate of incorporation, twenty dollars (\$20.00); for filing original annual reports, twenty dollars (\$20.00); for original or any renewal certificate of authority to enter, two hundred fifty dollars (\$250.00); for certificate of each agency, five dollars (\$5.00); and shall pay a fee set annually by the Administrator for the examination of the association. The Administrator may maintain an

action in the name of this State against such association for the recovery of any such fees in any court of competent jurisdiction. (1981, c. 282, s. 3.)

§ 54B-228. Subject to North Carolina law.

Any contract made by any foreign association with any citizen of this State shall be deemed and considered a North Carolina contract, and shall be so construed by all the courts of this State according to the laws thereof. (1981, c. 282, s. 3.)

§§ 54B-229 to 54B-235: Reserved for future codification purposes.

ARTICLE 12.

Mutual Deposit Guaranty Associations.

§ 54B-236. Definitions.

The term "institution" as used in this Article shall mean savings and loan associations organized or operated under the provisions of this Chapter, or credit unions organized or operated under the provisions of Article 10, Subchapter III of Chapter 54 of the General Statutes. (1981, c. 282, s. 3.)

§ 54B-237. Organization of a mutual deposit guaranty association.

(a) Any number of institutions, not less than 25, may become incorporated as a mutual deposit guaranty association without capital stock subject to the limitations prescribed in this Article. A mutual deposit guaranty association shall be governed by a board of directors or board of trustees of which a majority shall be representatives of the public and shall not be employees or directors of any insured member institution or have an interest in any insured member institution other than as a result of being a depositor or borrower.

(b) Articles of incorporation of a guaranty association shall be filed in the office of the Secretary of State. The Secretary of State shall, upon receipt of such articles, transmit a copy of them to the Administrator and shall not record them until authorized to do so by the Administrator. (1981, c. 282, s. 3.)

§ 54B-238. Examination and certification by Administrator.

(a) Upon receipt from the Secretary of State of a copy of the articles of incorporation of a proposed guaranty association, the Administrator shall at once examine all the facts connected with the formation of the proposed corporation. If the articles of incorporation are correct in form and substance and the examination shows that such corporation, if formed, would be entitled to commence the business of a guaranty association, the Administrator shall so certify to the Secretary of State.

(b) The Administrator may refuse to make such certification if upon examination he has reason to believe the proposed corporation is to be formed for any business other than assuring the liquidity of member institutions and guaranteeing deposits therein, if upon examination he has reason to believe that the character and general fitness of the incorporators are not such as to command the confidence of the general public or if the best interests of the public will not be promoted by its establishment. (1981, c. 282, s. 3.)

§ 54B-239. Recordation of articles of incorporation.

Upon receipt of the certification provided for in G.S. 54B-238, the Secretary of State shall record the articles of incorporation of such guaranty association and furnish a certified copy thereof to the incorporators and to the Administrator. Upon such recordation, such association shall be deemed a corporation. All papers thereafter filed in the office of the Secretary of State relating to such corporation shall be recorded as provided by law and a certified copy forwarded to the Administrator. (1981, c. 282, s. 3.)

§ 54B-240. Proposed amendments submitted to Administrator.

Any proposed amendments to the articles of incorporation of a mutual deposit guaranty association shall be filed in the office of the Secretary of State, who shall forward a copy thereof to the Administrator, and shall not record the amendments until authorized to do so by certification of the Administrator. (1981, c. 282, s. 3.)

§ 54B-241. Examination and certification of amendments.

(a) Upon receipt from the Secretary of State of a copy of proposed amendments to the articles of incorporation of a mutual deposit guaranty association, the Administrator shall at once examine the proposed amendments to determine their effect on the operation of the guaranty association.

(b) In the event the proposed amendments are correct in form and substance and the examination shows that if adopted they would not change the character or principal business of the guaranty association, the Administrator shall so certify to the Secretary of State.

(c) The Administrator may refuse to make certification if upon examination he has reason to believe that the proposed amendments would change the character of the business of the guaranty association or that the best interests of the public will not be promoted by their adoption. (1981, c. 282, s. 3.)

§ 54B-242. Recordation of amendments.

Upon receipt of the certification provided for in G.S. 54B-241, the Secretary of State shall record the amendments to the articles of incorporation and furnish a certified copy thereof to the mutual deposit guaranty association and to the Administrator. (1981, c. 282, s. 3.)

§ 54B-243. Reserve for losses.

A mutual deposit guaranty association shall maintain at all times an amount of funds equal to no less than one percent (1%) of its insured liability to cover losses of its members. These funds may include cash, investments, and reinsurance. (1981, c. 282, s. 3.)

§ 54B-244. Purposes and powers of mutual deposit guaranty associations.

(a) The purposes of a mutual deposit guaranty association incorporated in accordance with the provisions of this Article are to:

- (1) Assure the liquidity of a member institution;
- (2) Guarantee the withdrawable accounts, shares of deposits of member institutions;

(3) Serve, when appointed, as receiver of a member institution.

(b) A mutual deposit guaranty association incorporated in accordance with the provisions of this Article may:

- (1) Lend money to a member institution for the purpose of assuring its liquidity and withdrawable accounts, shares or deposits therein;
- (2) Purchase any assets owned by a member institution for the purpose of assuring its liquidity and withdrawable accounts, shares or deposits therein;
- (3) Invest any of its funds in:
 - a. Bonds or interest-bearing obligations of the United States or for which the faith and credit of the United States are pledged for the payment of principal and interest;
 - b. Bonds or interest-bearing obligations of this State;
 - c. Farm loans issued under the Federal Farm Loan Act and amendments thereto;
 - d. Notes, debentures, and bonds of a federal home loan bank issued under the Federal Home Loan Bank Act and any amendments thereto;
 - e. Bonds or other securities issued under the Home Owners' Loan Act of 1933 and any amendments thereto;
 - f. Securities acceptable to the United States to secure government deposits in national banks;
 - g. Deposits in any financial institution that is subject to examination and supervision by the United States or by this State;
 - h. Bonds or other evidences of indebtedness of counties and municipalities of the State of North Carolina, provided, that said bonds or other evidences of indebtedness of the counties and municipalities shall have a rating by Moody's Investors Services, Inc., of not less than AA, and a rating by the North Carolina Municipal Council, Inc., of not less than 90 points out of 100 points;
 - i. Stock in banking institutions licensed to do business in this State;
 - j. Securities and other investments authorized as liquid investments for any financial institution that is subject to examination and supervision by the United States or by this State;
 - k. Notes, bonds, debentures or securities rated in one of the four highest grades by a nationally recognized investment rating service.
- (4) Issue its capital notes or debentures to member institutions, provided the holders of these capital notes or debentures shall not be individually responsible for any debts, contracts, or engagements of the guaranty association issuing the notes or debentures;
- (5) Borrow money;
- (6) Exercise any corporate power or powers not inconsistent with, and which may be necessary or convenient to, the accomplishment of its purposes of assuring liquidity of member institutions and guaranteeing withdrawable accounts, shares or deposits therein;
- (7) Serve as receiver of a member institution;
- (8) Make or cause to be made examinations or audits of member institutions. (1981, c. 282, s. 3.)

§ 54B-245. Filing of semiannual financial reports; fees.

Each mutual deposit guaranty association shall on the 30th day of June and the 31st day of December of each year, or within 40 days thereafter, file with the Administrator a report for the preceding half year, showing its financial condition at the end thereof. Such reports shall be in such form and contain such information as may be prescribed by the Administrator. Each guaranty

association doing business in this State shall pay to the Administrator, at the time of filing each semiannual report required by this section, the sum of five dollars (\$5.00). All such fees shall be paid into the State treasury to the credit of the general fund. (1981, c. 282, s. 3.)

§ 54B-246. Supervision by Administrator.

(a) In addition to any and all other powers, duties and functions vested in the Administrator under the provisions of this Article, and for the protection of member institutions and the general public, the Administrator shall have general control and supervision over all mutual deposit guaranty associations doing business in this State. Mutual deposit guaranty associations shall be subject to the control and supervision of the Administrator as to their conduct, organization, management, business practices, reserve requirements and their financial and fiscal matters. Such control and supervision is subject to the provisions of G.S. 54B-53(g).

(b) The Administrator shall have the right, and is hereby empowered to issue rules and regulations whenever he deems it necessary for the administration of this Article as well as rules and regulations with respect to:

- (1) Types of financial records to be maintained by mutual deposit guaranty associations;
- (2) Retention periods of various financial records;
- (3) Internal control procedures of mutual deposit guaranty associations;
- (4) Conduct and management of mutual deposit guaranty associations;
- (5) Additional reports which may be required by the Administrator.

It shall be the duty of the board of directors or board of trustees of the mutual deposit guaranty association to put into effect and to carry out such rules and regulations.

(c) At least once each year the Administrator shall make or cause to be made an examination into the affairs of each mutual deposit guaranty association doing business in this State. The Administrator of the Credit Union Division of this State, in his capacity as supervisor of state-chartered credit unions, if he deems it necessary, may designate agents to participate in such examination. The expenses of such yearly examination shall be paid by the mutual deposit guaranty association so examined. (1981, c. 282, s. 3.)

§ 54B-247. Special examinations.

Whenever the Administrator deems it necessary, he may make or cause to be made a special examination or audit of any mutual deposit guaranty association doing business in this State, in addition to the regular examination provided for by this Article. The expenses of such a special examination or audit shall be paid by the mutual deposit guaranty association so examined. (1981, c. 282, s. 3.)

§ 54B-248. Right to enter and to conduct investigations.

The Administrator or any examiner appointed by him shall have access to and may compel the production of all books, papers, securities, moneys, and other property of a mutual deposit guaranty association under examination by him. He may administer oaths to and examine the officers and agents of such association as to its affairs. (1981, c. 282, s. 3.)

§ 54B-249. Removal of officers or employees.

The Administrator shall have the right, and is hereby empowered, to require the board of directors or board of trustees of any guaranty association to immediately remove from office any officer, director, trustee or employee of any mutual deposit guaranty association doing business in this State, who shall be found by the Administrator to be dishonest, incompetent, or reckless in the management of the affairs of the mutual deposit guaranty association, or in violation of the lawful orders, rules and regulations issued by the Administrator, or who violates any of the laws set forth in Chapter 54B of the General Statutes. (1981, c. 282, s. 3.)

§§ 54B-250 to 54B-260: Reserved for future codification purposes.

ARTICLE 13.***Savings and Loan Holding Companies.*****§ 54B-261. Savings and loan holding companies.**

(a) Notwithstanding any other provision of law, any stock association may reorganize its ownership, to provide for ownership by a savings and loan holding company, upon adoption of a plan of reorganization by a favorable vote of not less than two thirds of the members of the board of directors of the association and approval of such plan of reorganization by the holders of not less than a majority of the issued and outstanding shares of stock of the association. The plan of reorganization shall provide that (i) the resulting ownership shall be vested in a North Carolina corporation, (ii) all stockholders of the stock association shall have the right to exchange shares, (iii) the exchange of stock shall not be subject to State or federal income taxation, (iv) stockholders not wishing to exchange shares shall be entitled to dissenters' rights as provided under G.S. 55-113 and (v) the plan of reorganization is fair and equitable to all stockholders.

(b) All limitations or restrictions on the ownership of the stock of a stock association contained in this Chapter shall be and hereby are made applicable to the ownership of the stock of a savings and loan holding company which owns shares of stock of a stock association organized pursuant to this Chapter.

(c) A savings and loan holding company may invest only in (i) the stock of one or more other stock associations, (ii) deposits in financial institutions the principal offices of which are located in North Carolina and (iii) other investments in accordance with rules and regulations promulgated by the Administrator. However, in no event shall a savings and loan holding company make any investment not specified by this section or not permitted for an association under this Chapter. (1981, c. 282, s. 3.)

§ 54B-262. Supervision of savings and loan holding companies.

Savings and loan holding companies shall be under the supervision of the Administrator. The Administrator shall exercise all powers and responsibilities with respect to savings and loan holding companies which he exercises with respect to associations. (1981, c. 282, s. 3.)

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- 55-164.1. New corporations organized to succeed to rights in corporate charter forfeited.
- 55-164.2. Certain corporate documents acknowledged and recorded before January 1, 1977, validated.

Article 13.**Miscellaneous Provisions.**

- 55-165. Interrogatories by Secretary of State.
- 55-166. Penalties imposed upon corporations, officers and directors for failure to answer interrogatories.
- 55-167. Information disclosed by interrogatories.
- 55-168. Powers of Secretary of State.
- 55-169. Certificates and certified copies to be received in evidence.
- 55-170. Forms of documents required to be filed in office of Secretary of State.
- 55-171. Photostatic copies of documents acceptable for filing or recording.
- 55-172. Waiver of notice.
- 55-173. Notice to director or shareholder outside the United States.
- 55-174. Reserve power.
- 55-175. Cross references.

ARTICLE 1.**General Provisions.****§ 55-1. Title.**

This Chapter shall be known and may be cited as the Business Corporation Act. (1955, c. 1371, s. 1.)

Cross References. — For constitutional provisions regarding corporations, see N.C. Const., Art. VIII. As to receivers of corporations, see § 1-507.1 et seq. As to executions, see § 1-324.1 et seq. As to provisions relating to nonprofit corporations, see §§ 55A-1 to 55A-89.1.

As to jurisdiction of the superior court division over proceedings under this Chapter, see § 7A-249.

Editor's Note. — Session Laws 1955, c. 1371, inserted this new Chapter, numbered 55 and entitled "Business Corporation Act," to replace former Chapter 55 of the General Statutes, entitled "Corporations." By the same act certain sections of the former Chapter were transferred to §§ 1-324.1 through 1-324.7, and 1-507.1 through 1-507.11.

The citations in the historical references at

the end of the sections in this Chapter denote the sections as they stood prior to the 1955 revision.

Some of the notes appearing under subsequent sections of this Chapter are based on the comments of the corporation law drafting committee of the General Statutes Commission.

Legal Periodicals. — For article giving comments of draftsmen of the Business Corporation Act, see 33 N.C.L. Rev. 26 (1954).

For case law survey on business associations, see 41 N.C.L. Rev. 415 (1963).

For article reevaluating the Business Corporation Act, see 43 N.C.L. Rev. 768 (1965).

For article surveying case law as to corporations, see 44 N.C.L. Rev. 950 (1966).

For note on the liability of directors and officers for negligent management, see 45 N.C.L. Rev. 748 (1967).

For comment on tax and corporate aspects of professional incorporation in North Carolina, see 48 N.C.L. Rev. 573 (1970).

CASE NOTES

Cited in *Adams v. Flora Macdonald College*, 247 N.C. 648, 101 S.E.2d 809 (1958); *Johns-Manville Sales Corp. v. Townsend*, 248

N.C. 687, 104 S.E.2d 826 (1958); *Raab & Co. v. Independence Corp.*, 9 N.C. App. 674, 177 S.E.2d 337 (1970).

§ 55-2. Definitions.

As used in this Chapter, unless the context otherwise requires, the term:

- (1) "Accrued dividends" means, with reference to cumulative preferred shares, the amount by which the aggregate cumulative dividend preferences pertaining to a share of such class for the entire period during which the share was outstanding and cumulative, exceeds all the dividends actually paid thereon. For the purpose of this definition, a dividend is deemed paid if it has been declared and funds for its payment have been set aside.
- (2) "Assets" means those properties and rights, other than treasury shares, which in accordance with generally accepted principles of sound accounting practice, are recognized as being properly entered upon the books and balance sheets of business enterprises in terms of a monetary value.
- (3) "Charter" includes the original articles of incorporation, together with all amendments thereto and articles of merger or consolidation, and also includes what have heretofore been designated by law as certificates of incorporation, agreements of merger or of consolidation, or charters. When any provisions of this Chapter require a certified copy of a foreign corporation's "charter" to be filed, the corporation may file either certified copies of its articles and all amendments or a certified copy of its integrated articles or a certified copy of a restatement of its articles.
- (4) "Corporation" means a corporation for profit or having a capital stock which may have been or may be created and organized under this Chapter or any other general or any special act of this State. "Foreign corporation" means any other corporation for profit. Nothing in this definition is intended to preclude the application of this Chapter to foreign corporations in those circumstances where the principles of conflicts of laws permit their application.
- (5) "Dividend credit" means the aggregate of all yearly dividend credits. "Yearly dividend credit" means with respect to noncumulative preferred shares, the amount by which the full dividend preference of such a share, to the extent that such preference is earned by the corporation with respect to such a share in a particular fiscal year, exceeds the dividends paid on said share for that year; provided, that no dividend credit shall accrue unless, and only to the extent that, there exists an earned surplus at the end of such fiscal year. Computa-

tions of earnings allocable to classes of shares made in good faith by the board of directors in accordance with generally accepted principles of sound accounting practice or made or adopted by them on the bases represented by an independent public accountant or by a certified public accountant or by a firm of such accountants as being in accordance with generally accepted principles of sound accounting practice shall be conclusive. For the purpose of this definition, a dividend is deemed paid if it has been declared and funds for its payment have been set aside.

- (6) "Dominant shareholder" means a shareholder of a particular corporation, domestic or foreign, who by virtue of his shareholdings has legal power, either directly or indirectly or through another corporation or series of other corporations, domestic or foreign, to elect a majority of the directors of the said particular corporation.
- (7) "Liabilities" means all those debts and claims which either are known to impose a fixed obligation of payment or, if contingent, have sufficient possibility of becoming fixed as to require in accordance with generally accepted principles of sound accounting practice an estimate of their probable amount. Unaccrued obligations under short or long term leases not in default are not, in absence of special circumstances, required to be included as liabilities. Liabilities do not include stated capital or the amount of accrued dividends and dividend credits with respect to shares entitled to preferential dividends except to the extent that dividends have been declared but are unpaid.
- (8) "Net assets" means the amount of a corporation's assets in excess of its liabilities.
- (9) "Parent corporation" and "subsidiary corporation." "Parent corporation" means a corporation which is a dominant shareholder, as herein defined. A corporation through which, by virtue of its shareholdings alone, a parent corporation has power to exercise the control which makes the latter a parent corporation is itself a parent corporation. A corporation with respect to which another corporation is a parent corporation is a "subsidiary corporation."
- (10) "Preferred share" means a share of a class, whether or not designated by the term "preferred," entitling its holder to receive dividends before dividends are paid to shares of another class. (1955, c. 1371, s. 1; 1959, c. 1316, s. 1.)

CASE NOTES

Applied in *Cooke v. Outland*, 265 N.C. 601, 144 S.E.2d 835 (1965); *State ex rel. Utilities Comm'n v. General Tel. Co.*, 281 N.C. 318, 189 S.E.2d 705 (1972).

Quoted in *Watson v. Watson Seed Farms,*

Inc., 253 N.C. 238, 116 S.E.2d 716 (1960).

Cited in *State v. Thompson*, 6 N.C. App. 64, 169 S.E.2d 241 (1969); *State ex rel. Utilities Comm'n v. Intervenor Residents*, 305 N.C. 62, 286 S.E.2d 770 (1982).

§ 55-3. Applicability of Chapter.

(a) The provisions of this Chapter shall apply to every corporation for profit, and, so far as appropriate, to every corporation not for profit having a capital stock, now existing or hereafter formed, and to the outstanding and future securities thereof, unless the corporation is expressly excepted from the operation hereof or except to the extent that there is other specific statutory provision particularly applicable to the corporation or inconsistent with some provisions of this Chapter, in which case that other provision prevails.

(b) Notwithstanding the provisions of subsection (a) of this section, no corporation having a capital stock and formed for religious, charitable, nonprofit, social, or literary purposes shall hereafter be formed under this Chapter.

(c) The existence of corporations formed or existing on the date this Chapter takes effect shall not be impaired by the enactment of this Chapter nor by any change in the requirements for the formation of corporations nor by any amendment or repeal of the laws under which they were formed or created, and, except as otherwise expressly provided in this Chapter, the repeal of a prior act by this Chapter shall not affect any liability or penalty incurred, under the provisions of such act, prior to the repeal thereof. (1955, c. 1371, s. 1; 1957, c. 550, s. 1; 1973, c. 469, s. 1.)

CASE NOTES

Building and Loan Associations. — Building and loan associations have capital stock. *White v. Smith*, 256 N.C. 218, 123 S.E.2d 628 (1962).

Under this section the right to know the names of their associates for the purpose of conducting an effective campaign in preparation for a stockholders' meeting, is extended to the shareholders of a building and loan association. *White v. Smith*, 256 N.C. 218, 123 S.E.2d 628 (1962).

Domestic Banks. — The provisions of this

chapter are applicable to domestic banks operating in North Carolina. *Cooke v. Outland*, 265 N.C. 601, 144 S.E.2d 835 (1965).

Domestic banking corporations are not expressly excepted from the operation of this Chapter, and there is no "specific statutory provision particularly applicable" to domestic banks operating in North Carolina or inconsistent with some provisions of this Chapter, so as to make such provision prevail. *Cooke v. Outland*, 265 N.C. 601, 144 S.E.2d 835 (1965).

§ 55-3.1. Effect of acquisition of all shares by less than three persons.

(a) No provision in this Chapter, or in any prior act shall be construed as an indication of any legislative intention that the existence of a corporation, hereafter or heretofore formed, is in any respect impaired by the acquisition of all of the shares by one person or by two persons or that by such acquisition the corporation ceases to possess any managerial boards or bodies or any capacities, powers, or authority which it would have possessed with three or more shareholders, or that upon such acquisition the corporation becomes dormant, inactive or incapable of acting as a corporation.

(b) The acquisition, heretofore or hereafter, of all of the shares of a corporation by one person or by two persons is hereby declared to violate no policy or provision of the laws of this State.

(c) Any action heretofore taken by or on behalf of a corporation or a purported corporation and which might have been invalid, defective or ineffective solely in consequence of the ownership or beneficial ownership of all the shares of the corporation or purported corporation by one person or by two persons is hereby declared to be valid and effective.

(d) If any corporation or purported corporation might have been considered dormant or inactive solely in consequence of the acquisition heretofore of all its shares by one or by two persons, such corporation or purported corporation is hereby declared to have had uninterrupted existence and to have possessed uninterrupted capacity to act as a corporation. (1957, c. 550, s. 2.)

Legal Periodicals. — For comment on this section and the concentration of stock ownership in the one- or two-man corporation, see 36 N.C.L. Rev. 48 (1957).

CASE NOTES

Corporation as Alter Ego of Dominant Shareholder. — The mere fact that one person owns all of the stock of a corporation does not make its acts the acts of the stockholder so as to impose liability therefor upon him. However, when the corporation is so operated that it is a mere instrumentality or alter ego of the sole or dominant shareholder and a shield for his activities in violation of the declared public policy or statute of the State, the corporate entity will be disregarded and the corporation and the shareholder treated as one and the same person, it being immaterial whether the sole or dominant shareholder is an individual or another corporation. *Henderson v. Security Mtg. & Fin. Co.*, 273 N.C. 253, 160 S.E.2d 39 (1968).

When Corporation Regarded as an Association of Persons. — When the notion of legal entity is used to defeat public convenience, justify wrong, protect fraud, or defend crime, the law will regard the corporation as an association of persons. *Henderson v. Security Mtg. & Fin. Co.*, 273 N.C. 253, 160 S.E.2d 39 (1968).

Personal liability of stockholder created before the effective date of this section

because corporation did not have three shareholders, will not be defeated by virtue of this section. *Lester Bros. v. Pope Realty & Ins. Co.*, 250 N.C. 565, 109 S.E.2d 263 (1959).

For case decided before the passage of this section and dealing with the effect of the acquisition of all stock in a corporation by one person, see *Park Terrace, Inc. v. Phoenix Indem. Co.*, 243 N.C. 595, 91 S.E.2d 584 (1956), commented on in 34 N.C.L. Rev. 471, 531 (1956).

Chattel Mortgage Executed in Name of Corporation by Person Acquiring All Stock is Corporate Act. — Acquisition of the entire capital stock of a corporation by one person does not affect the corporate entity, and the execution in the name of the corporation by such person of a chattel mortgage is a corporate act and binding, provided the rights of its then existing creditors are not affected. *Wall v. Colvard, Inc.*, 268 N.C. 43, 149 S.E.2d 559 (1966).

Quoted in *Snyder v. Freeman*, 300 N.C. 204, 266 S.E.2d 593 (1980).

Stated in *Sharpe v. Grindstaff*, 329 F. Supp. 405 (M.D.N.C. 1970).

ARTICLE 2.

*Execution and Filing of Certain Corporate Documents.***§ 55-4. Execution of corporate documents for filing; filing, recording and effectiveness.**

(a) Whenever the provisions of this Chapter require any document relating to a corporation to be executed and filed in accordance with this section, unless otherwise specifically stated in this Chapter:

- (1) There shall be an original executed document and also one conformed copy.
- (2) The said original document shall, if required to be executed by the corporation, be signed by the president or a vice-president and also by the secretary or an assistant secretary, with or without the corporate seal. In the case of a banking corporation, a cashier or an assistant cashier may act in lieu of a secretary or assistant secretary. If required to be executed by designated individuals, each of them shall sign.
- (3) Except where the provisions of this Chapter specifically require acknowledgment, the said original document shall be verified by each of the individuals signing, whether in a representative capacity or otherwise, by a statement under oath, made before and certified by an official who is authorized under the laws of this State to take acknowledgments, declaring that he signed the said document, that the statements therein are true, and, in the case of an individual who signed in a representative capacity, declaring the capacity in which he signed and that he was authorized so to sign.
- (4) The conformed copy may either extend its conformation with the original document through all the verifications (or acknowledgments,

as the case may be) or may in lieu of such extension contain the legend, after the name of the signers substantially as follows: "Original duly verified (acknowledgment) by all signers."

- (5) The original document so signed and verified (or acknowledged, as the case may be), together with the conformed copy, shall be delivered to the Secretary of State. Unless he finds that it does not conform to law, the Secretary of State shall, when the proper taxes and fees have been tendered, endorse upon the original the word "filed" and the hour, day, month, and year of the filing thereof and shall file the same in his office. The Secretary of State shall thereupon immediately compare the copy with the original and if he finds that they are identical he shall make upon the conformed copy the same endorsement which appears on the original and shall attach to the copy a certificate stating that attached thereto is a true copy of the document, designated by an appropriate title, filed in his office and showing the date of such filing. He shall thereupon return the copy so certified to the corporation or its representative.
- (6) The copy, certified as aforesaid, shall, within 60 days after the receipt by the corporation or its representative be delivered to the register of deeds of the county wherein the corporation has its registered office, and, when the proper fees shall have been tendered, it shall be recorded and properly indexed in a book to be known as the Record of Incorporations. Promptly after the recordation, the register of deeds shall note the fact of recordation on the said copy and return it to the corporation or its representative.

(b) Any such document required to be filed shall be completely effective when endorsed by the Secretary of State as provided in subsection (a)(5) above and the transaction to be effectuated thereby shall thereupon be deemed to be completely consummated as if all the required recording had been perfected, provided, however, that in lieu of the time of such endorsement by the Secretary of State, such document may fix an hour, day, month and year not more than 20 days subsequent to the endorsement of the Secretary of State and the transaction shall be deemed to be completely consummated at the time fixed by such document as if all the required recording had been perfected. Unless otherwise provided in this Chapter with respect to some specific document, failure to deliver it for recording in the office of the register of deeds shall only subject the corporation to a penalty of one hundred dollars (\$100.00) to be collected by the Secretary of State.

(c) It shall be the duty of the Secretary of State, whenever so requested and upon tender of the proper fees, to certify as aforesaid any true copy of any such document on file in his office or, if such be the request, to make or cause to be made typewritten or photostatic copies of such documents and to certify the same as aforesaid. (1955, c. 1371, s. 1; 1967, c. 13, s. 1; c. 823, s. 16.)

Editor's Note. — Under this section verification has taken the place of acknowledgment for most documents, but § 55-6 requires that articles of incorporation be acknowledged. Under subsection (b), despite the local recording requirement, the document becomes

effective upon filing with the Secretary of State.

Legal Periodicals. — For article entitled, "Revolving Funds: In the Vanguard of the Preservation Movement," see 11 N.C. Cent. L.J. 256 (1980).

ARTICLE 3.

*Formation, Name and Registered Office.***§ 55-5. Purposes.**

Corporations for profit may be organized under this Chapter for any lawful purposes. Where by law special provisions are made for the organization of designated classes of corporations such corporations shall be formed under those provisions and not hereunder. (1955, c. 1371, s. 1.)

§ 55-6. Incorporators.

One or more natural persons, whether or not residents of this State, of the age of 18 years or more may act as incorporators of a corporation by signing and acknowledging articles of incorporation, which shall be filed in accordance with the provisions of G.S. 55-4. The acknowledgment shall be before an officer duly authorized under the laws of this State to take the proof or acknowledgment of deeds. (Code, ss. 677, 678, 679, 682; 1885, cc. 19, 190; 1893, c. 318; 1897, c. 204; 1901, c. 2, ss. 8, 9; cc. 6, 41; 1903, c. 453; Rev., ss. 1137, 1139; C.S., s. 1114; 1945, c. 635; G.S., ss. 55-2, 55-3; 1951, c. 265, s. 1; 1955, c. 1371, s. 1; 1969, c. 751, s. 1; 1971, c. 1231, s. 1.)

CASE NOTES

Duties and Obligations of Promoters. — The promoters of a corporation are held to the duties of trustees and the obligation of directors. They may not take a secret or

undisclosed profit in the organization by way of shares therein or otherwise. *Goodman v. White*, 174 N.C. 399, 93 S.E. 906 (1917).

§ 55-7. Articles of incorporation.

The articles of incorporation shall set forth:

- (1) The name of the corporation.
- (2) The period of duration, which may be perpetual. When the articles fail to state the period of duration, it shall be considered perpetual.
- (3) The purpose or purposes for which the corporation is organized. It shall be sufficient to state, either alone or with other purposes, that the purpose for which the corporation is organized is to engage in any lawful act or activity for which corporations may be organized under this Chapter; and by such statement all lawful acts and activities for corporations organized under this Chapter shall be within the purposes of the corporation, subject to any express limitations.
- (4) With respect to the shares which the corporation shall have authority to issue:
 - a. If the shares are to have a par value, the number of such shares and the par value of each share,
 - b. If the shares are to be without par value, the number of such shares,
 - c. If the shares are to be of both kinds mentioned in paragraphs a and b of subdivision (4) of this section, particulars in accordance with those paragraphs,
 - d. If the shares are to be divided into classes, or into series within a class of preferred or special shares, the articles of incorporation shall also set forth either:

1. A designation of each class, with a designation of each series if there are to be series fixed by the articles of incorporation within a class, and a statement of the preferences, limitations and relative rights of the shares of each class or series, insofar as such preferences, limitations, and rights are to be fixed in the articles of incorporation; or
2. A designation of each class and a statement authorizing the board of directors to fix the preferences, limitations and relative rights of each class, or to establish series within a class and to determine the variations between series, insofar as the same are not to be fixed in the articles of incorporation; or
3. A designation of each class, without the further designation or statements provided for in subparagraphs 1 and 2 of this paragraph d.

To the extent that the preferences, limitations, and relative rights of each class, and provisions for series within a class, are not set out in the articles of incorporation, the same may be fixed by the shareholders or directors in accordance with the provisions of G.S. 55-42.

- (5) The minimum amount of consideration for its shares to be received by the corporation before it shall commence business.
- (6) Any provision limiting or denying to shareholders the preemptive right to acquire additional or treasury shares of the corporation.
- (7) Any provision, not inconsistent with law, which the incorporators elect to set forth in the articles of incorporation for the regulation of the internal affairs of the corporation, including any provision which under this Chapter is required or permitted to be set forth in the bylaws. No provisions shall make fully paid shares assessable.
- (8) The address, including county and city or town, and street and number, if any, of its initial registered office, which shall be in this State, and the name of its initial registered agent at such address.
- (9) The number of directors constituting the initial board of directors (who may be classified in accordance with the provisions of G.S. 55-26) and the name and address, including street and number, if any, of each person who is to serve as a director until the first meeting of shareholders or until his successor be elected and qualified.
- (10) The name and address, including street and number, if any, of each incorporator.

It shall not be necessary to set forth in the articles of incorporation any of the corporate powers enumerated in this Chapter. (Code, s. 677; 1885, c. 19; 1889, c. 170; 1891, c. 257; 1893, c. 244; 1901, c. 2, s. 8; c. 47; 1903, c. 453; Rev., s. 1137; 1911, c. 213, s. 1; 1913, c. 5, s. 1; C.S., s. 1114; Ex. Sess. 1920, c. 55; 1924, c. 98; 1935, cc. 166, 320; 1939, c. 222; G.S., s. 55-2; 1951, c. 265, s. 1; 1955, c. 1371, s. 1; 1957, c. 979, s. 5; 1959, c. 1316, s. 1½; 1969, c. 751, s. 2; 1973, c. 469, s. 2.)

CASE NOTES

Corporation Limited to Objects Stated. — A charter of incorporation creating a company for the purpose of effecting a communication by a plank-road between designated points, with the privilege of taking tolls, did not authorize the company to establish a stage line upon their road, nor to contract for carrying the United States mail. *Wiswell v. Greenville Plank-Road Co.*, 56 N.C. 183 (1857).

Need Not Use All Powers. — The fact that a corporation avails itself of only one of several privileges granted by its charter does not invalidate the act of incorporation. *Wadesboro Cotton Mills Co. v. Burns*, 114 N.C. 353, 19 S.E. 238 (1894).

Limit of Corporate Existence. — It is unquestionably true that a corporation whose term of existence is fixed and limited in the act

which creates it cannot endure beyond the prescribed time, unless its existence is prolonged by the same authority or continued for the purpose of adjusting and closing its business, and no judicial proceedings are required to terminate it. *Asheville Div. No. 15, Sons of Temperance v. Aston*, 92 N.C. 578 (1885).

De Jure and De Facto Existence. — A corporation de jure is said to exist when persons holding a charter have made substantial compliance with the provisions of the same, looking to its proper organization, while a corporation de facto is one where the parties having a charter or law authorizing it have in good faith made a colorable compliance with such requirements, and have proceeded in the exercise of the corporate powers or a part of them. *Wood v. Staton*, 174 N.C. 245, 93 S.E. 794 (1917).

Existence of a corporation may be proved by reputation. Existence or nonexistence is a fact and may be proved as other facts. *Gulf States Steel Co. v. Ford*, 173 N.C. 195, 91 S.E. 844 (1917).

Proof of Existence by Written Contract.

— Where a written contract entered into between the parties furnishes evidence that the defendant was dealing with the plaintiff as a corporation, and the plaintiff's existence as a corporation is denied, the contract may properly be introduced upon this disputed fact. *Otis Elevator Co. v. Cape Fear Hotel Co.*, 172 N.C. 319, 90 S.E. 253 (1916).

Copies of Letters of Incorporation as Proof of Existence. — Copies of letters of incorporation are admissible to show prima facie the existence of a corporation, and the corporation cannot avoid its liability for debts because in fact it had but an inchoate existence. *Marshall v. Macon County Bank*, 108 N.C. 639, 13 S.E. 182 (1891).

Cited in *W.R. Co. v. North Carolina Property Tax Comm'n*, 48 N.C. App. 245, 269 S.E.2d 636 (1980).

§ 55-8. Corporate existence; filing of articles of incorporation; effect.

The time when corporate existence begins is determined by the provisions of G.S. 55-4, and a copy of the articles certified by the Secretary of State shall be conclusive evidence that all conditions precedent required to be performed by the incorporators have been complied with and that the corporation has been incorporated under this Chapter, except as against this State in a proceeding to annul or revoke the articles of incorporation. (1901, c. 2, s. 10; Rev., s. 1140; C.S., s. 1116; G.S., s. 55-4; 1955, c. 1371, s. 1; 1957, c. 550, s. 3; 1967, c. 13, s. 3.)

Cross References. — As to execution, filing, and recording of documents, see § 55-4.

§ 55-9. Requirement before commencing business.

A corporation shall not transact any business or incur any indebtedness except such as shall be incidental to its organization or to obtaining subscription to or payment for its shares, until a certified copy of the articles of incorporation has been filed and recorded in accordance with the provisions of G.S. 55-4 and until there has been received the amount stated in the articles of incorporation as being the minimum amount of consideration to be received for its shares before commencing business. (1955, c. 1371, s. 1.)

CASE NOTES

Applied in *Keels v. Turner*, 45 N.C. App. 213, 262 S.E.2d 845 (1980).

§ 55-10. Exercise of corporate franchises not granted.

The Attorney General may upon his own information or upon complaint of a private party bring an action in the name of the State to restrain any person from exercising corporate franchises not granted. (Code, ss. 607, 686; 1901, c. 2, s. 107; Rev., s. 1197; C.S., s. 1143; G.S., s. 55-47(2); 1955, c. 1371, s. 1.)

§ 55-11. Organization meeting of directors.

After the filing of the articles of incorporation in the office of the Secretary of State, an organization meeting of the board of directors named in the articles of incorporation shall be held, either within or without this State, at the call of a majority of the directors, for the purpose of adopting bylaws, electing officers, and the transaction of such other business as may come before the meeting. The directors calling the meeting shall give at least three days' notice thereof by mail to each director so named, which notice shall state the time and place of the meeting, unless notice is waived as hereinafter provided. Any action permitted to be taken at the organization meeting may be taken without a meeting of the board of directors and shall be deemed board action if it complies with the requirements of G.S. 55-29. (Code, s. 665; 1901, c. 2, s. 18; Rev., s. 1142; C.S., s. 1118; G.S., s. 55-6; 1955, c. 1371, s. 1; 1969, c. 751, s. 3.)

CASE NOTES

Cited in *Keels v. Turner*, 45 N.C. App. 213, 262 S.E.2d 845 (1980).

§ 55-12. Corporate name.

(a) The corporate name shall contain the wording "corporation," "incorporated," "limited" or "company" or an abbreviation of one of such words.

(b) The corporate name shall not contain any word or phrase which is likely to mislead the public or which indicates or implies that it is organized for any purpose other than one or more of the purposes contained in its charter.

(c) The corporate name shall not, subject to the provisions of G.S. 55-137(c), be the same as, or deceptively similar to, the name of any domestic corporation or of any foreign corporation authorized to transact business in this State, or a name the exclusive right to which is, at the time, reserved or registered by some other person in the manner prescribed in this section.

(d) The exclusive right to a corporate name not prohibited by this section may be reserved for a period of 90 days by:

- (1) Any person intending to organize a corporation under this Chapter.
- (2) Any domestic corporation intending to change its name.
- (3) Any foreign corporation intending to make application for a certificate of authority to transact business in this State.
- (4) Any foreign corporation authorized to transact business in this State and intending to change its name.
- (5) Any person intending to organize a foreign corporation and intending to have such corporation make application for a certificate of authority to transact business in this State.

The same name shall not be reserved for two or more consecutive 90-day periods by the same applicant or for the use and benefit of the same applicant; nor shall such consecutive reservations be made of names so similar as to fall within the prohibition of this section.

(e) Any person or corporation acquiring the goodwill of a domestic corporation or of a foreign corporation authorized to transact business in this State may, on furnishing the Secretary of State satisfactory evidence of such acquisition, reserve the exclusive right to the corporate name of the said corporation for a period of 10 years.

(f) The reservation of name, pursuant to subsections (d) and (e) of this section, shall be made by filing with the Secretary of State a verified application therefor stating the name and address of the applicant, and the Secretary of State shall, upon tender of the fee hereinafter prescribed, reserve the name exclusively for the applicant unless he finds that the name is not available under the provisions of this section.

(g) The exclusive right to a specified corporate name reserved hereunder, may, on tender of the fee hereinafter prescribed, be transferred to any other person or corporation by filing in the office of the Secretary of State a notice of such transfer, executed by the applicant for whom the name was reserved and specifying the name and address of the transferee.

(h) Any foreign corporation not transacting business in this State may register its corporate name, if, not prohibited by this section, by filing with the Secretary of State a verified application therefor setting forth the name and address of the principal office of the corporation, the jurisdiction in which it is incorporated, the date of its incorporation, a statement that it is organized and doing business in good standing under the laws of the jurisdiction in which it is incorporated, and a brief statement of the business in which it is engaged; and the Secretary of State shall, upon tender of the fee prescribed by G.S. 55-155(a)(1), register the name exclusively for the use of such foreign corporation, unless he finds that the name is not available under the provisions of this section. Such registration shall be effective for a period of one year, and it may be renewed from year to year, not to exceed 10 years, by filing with the Secretary of State a verified renewal application setting forth the same facts required to be set forth in the original application for registration. Any renewal application filed after the expiration of the registration shall be treated as a new application for registration.

(i) The Secretary of State may revoke any reservation or registration of a corporate name if he finds, upon a hearing held not less than five days after written notice has been sent by registered mail to the person or corporation who made the reservation or registration, that the application therefor or any transfer thereof was not made in good faith or that any statement contained in the application for reservation or registration was false when such application was filed or has thereafter become false.

(j) The use by a corporation of a name in violation of this section may be enjoined notwithstanding the filing of its articles by the Secretary of State.

(k) The issuance of a corporate charter to any domestic corporation shall not authorize the use in this State of the corporate name in violation of the rights of any third party under the federal Trademark Act, the Trademark Act of this State, or the common law; and the issuance of such charter shall not be a defense to an action for violation of any such rights. (1901, c. 2, s. 8; 1903, c. 453; Rev., s. 1137; 1913, c. 5, s. 1; C.S., s. 1114; 1935, cc. 166, 320; 1939, c. 222; G.S., s. 55-2; 1955, c. 1371, s. 1; 1959, c. 1316, s. 28; 1969, c. 751, ss. 4-6; 1973, c. 469, s. 45.3.)

CASE NOTES

"Homestead Builders" Insufficient. — Where a contract or sale entered into by a purported corporation used only the name "Homestead Builders," and, similarly, the bank

account of the purported corporation was opened in the name of "Homestead Builders," the corporate name did not comply with subsection (a) of this section. *Keels v. Turner*, 45 N.C.

App. 213, 262 S.E.2d 845, cert. denied, 300 N.C. 197, 269 S.E.2d 624, rehearing denied, 270 S.E.2d 109 (N.C. 1980).

Applied in Goard v. Branscom, 15 N.C. App. 34, 189 S.E.2d 667 (1972).

Quoted in State v. Ellis, 33 N.C. App. 667, 236 S.E.2d 299 (1977).

Cited in State v. Thornton, 251 N.C. 658, 111 S.E.2d 901 (1960); State v. Thompson, 6 N.C. App. 64, 169 S.E.2d 241 (1969).

§ 55-13. Registered office and registered agent.

(a) Each corporation shall have and continuously maintain in this State:

- (1) A registered office which may be, but need not be, the same as its place of business.

- (2) A registered agent, which agent may be either an individual resident in this State whose business office is identical with such registered office, or a domestic corporation, or a foreign corporation authorized to transact business in this State, having a business office identical with such registered office.

(b) A corporation formed prior to July 1, 1957, which has not designated a principal office is required on or after July 1, 1957, to designate a registered office and a registered agent in the manner, as near as may be, provided in G.S. 55-14; other corporations formed prior to July 1, 1957, shall not be required to, but may, designate a registered office and a registered agent in the manner, as near as may be, provided in G.S. 55-14. (1901, c. 5; Rev., s. 1243; C.S., s. 1137; 1937, c. 133, ss. 1-3; G.S., ss. 55-38, 55-39; 1955, c. 1371, s. 1; 1957, c. 979, s. 17.)

CASE NOTES

Applied in Royal Bus. Funds Corp. v. South E. Dev. Corp., 32 N.C. App. 362, 232 S.E.2d 215 (1977).

Stated in Jewel Box Stores Corp. v. Morrow,

272 N.C. 659, 158 S.E.2d 840 (1968).

Cited in Great Dane Trailers, Inc. v. North Brook Poultry, Inc., 35 N.C. App. 752, 242 S.E.2d 533 (1978).

§ 55-14. Change of registered office or registered agent.

(a) A corporation may change its registered office or its registered agent or both. To effectuate such change a statement shall be executed by the corporation and filed, in accordance with the provisions of G.S. 55-4, setting forth:

- (1) The name of the corporation;
- (2) The address, including county and city or town, and street and number, if any, of its then registered office;
- (3) If the address of its registered office be changed, the address, including county and city or town, and street and number, if any, to which the registered office is to be changed;
- (4) The name of its then registered agent;
- (5) If its registered agent be changed, the name of its successor registered agent;
- (6) That the address of its registered office and the address of the business office of its registered agent, as changed, will be identical;
- (7) That such change was authorized by resolution duly adopted by its board of directors.

(b) If the change in the registered office is to another county, a copy of such statement certified by the Secretary of State shall be recorded both in the old county and in the new county, and there shall also be recorded in the new county, in the manner prescribed by G.S. 55-4, a similarly certified copy of the corporation's charter.

(c) If the statement purporting to effectuate such changes is not recorded in all the offices wherein recording is required by this section, persons asserting claims against the corporation may treat as the registered agent or registered office of the corporation either the one newly designated in the statement or the preexisting one.

(d) Any registered agent of a corporation may resign as such agent upon filing a written notice thereof executed in duplicate, with the Secretary of State, who shall forthwith mail a copy thereof to the corporation at its registered office, or, in the case of a foreign corporation, to the address of the principal office of the corporation in the state or country under the laws of which it is incorporated. The appointment of such agent shall terminate upon the expiration of 30 days after receipt of such notice by the Secretary of State. If the corporation fails to record said resignation in the county where it has its registered office, any process served upon the agent shall, despite his resignation, be as effective as if he had not resigned, but the agent in such case shall be under no duty to the corporation with respect to such process.

(e) In lieu of the procedure set out in subsection (a) above the location of the registered office of a domestic corporation may be changed from one address to another in the same city or town in this State upon the change of the business office of its registered agent, upon the making and executing by the registered agent of such corporation of a certificate, duly acknowledged before an officer authorized by the laws of this State to take acknowledgments of deeds, setting forth the name of each corporation represented by such registered agent and the address at which such registered agent has maintained a registered office for each of such corporations and further certifying to the new address to which such registered office will be transferred on a given day and at which new address such registered agent will thereafter maintain the registered office of each of the corporations recited in the certificate. Such certificate shall be filed in duplicate in the office of the Secretary of State who shall then furnish a certified copy of the same, showing the date of such filing, and shall return the copy so certified to the registered agent, and the copy, certified as aforesaid, shall, within 60 days after the receipt by the registered agent be delivered to the register of deeds of the county wherein the corporation has its registered office, and, when the proper fees shall have been tendered, it shall be recorded and properly indexed in a book to be known as the Record of Incorporations. Promptly after the recordation, the register of deeds shall note the fact of recordation on the said copy and return it to the registered agent. The fee to be charged by the Secretary of State for the filing of such certificate shall be three dollars (\$3.00) for each corporation listed in said certificate, the total not to exceed two hundred dollars (\$200.00). (1901, c. 2, s. 31; Rev., s. 1176; C.S., s. 1133; G.S., s. 55-34; 1955, c. 1371, s. 1; 1957, c. 979, ss. 6, 7; 1965, c. 298, s. 1; 1967, c. 823, s. 17; 1973, c. 262; c. 469, s. 3.)

Legal Periodicals. — For note on the 1965 amendments to this Chapter, see 44 N.C.L. Rev. 1106 (1966).

§ 55-15. Service of process on corporation.

(a) Service upon the registered agent appointed by a corporation of any process, notice or demand required or permitted by law to be served upon the corporation shall be binding upon the corporation.

(b) Whenever a corporation shall fail to appoint or maintain a registered agent in this State, or whenever its registered agent cannot with due diligence be found at the registered office, then the Secretary of State shall be an agent of such corporation upon whom any such process, notice, or demand may be

served. Service on the Secretary of State of any such process, notice, or demand shall be made by delivering to and leaving with him, or with any clerk having charge of the corporation department of his office, duplicate copies of such process, notice or demand. In the event any such process, notice or demand is served on the Secretary of State, he shall immediately cause one of the copies thereof to be forwarded by registered or certified mail, addressed to the corporation at its registered office. Any such corporation so served shall be in court for all purposes from and after the date of such service on the Secretary of State.

(c) The Secretary of State shall keep a record of all processes, notices and demands served upon him under this section, and shall record therein the time of such service and his action with reference thereto.

(d) Nothing herein contained shall limit or affect the right to serve any process, notice or demand required or permitted by law to be served upon a corporation in any other manner now or hereafter permitted by law. (1937, c. 133, ss. 1-3; G.S., s. 55-39; 1955, c. 1371, s. 1; 1977, 2nd Sess., c. 1219, s. 33.)

CASE NOTES

Purpose of Service on Secretary of State.

— The provision for service of process on the Secretary of State is not in the nature of a penalty upon the corporation for not having an agent upon whom service could be had, and not keeping the name of such agent on file with the Secretary of State, which might be condoned because of the alleged inability of the corporation to comply with the statute. It is a device for public convenience and is sustained upon the theory that it is reasonably adequate notice, either to be employed alternatively or where other forms of notice are unavailable. *Sisk v. Old Hickory Motor Freight*, 222 N.C. 631, 24 S.E.2d 488 (1943).

Service upon a corporation by substituted service upon the Secretary of State does not violate due process of law. *Royal Bus. Funds Corp. v. South E. Dev. Corp.*, 32 N.C. App. 362, 232 S.E.2d 215, cert. denied, 292 N.C. 728, 235 S.E.2d 784 (1977).

Test of Sufficiency of Notice. — The test is not whether defendants received actual notice but whether the notice was of a nature reasonably calculated to give them actual notice and the opportunity to defend. *Royal Bus. Funds Corp. v. South E. Dev. Corp.*, 32 N.C. App. 362, 232 S.E.2d 215, cert. denied, 292 N.C. 728, 235 S.E.2d 784 (1977).

Actual Receipt of Notice Not Required under Subsection (b). — Subsection (b), which directs the Secretary of State to forward the process by registered mail, does not require

that the defendant corporation receive actual notice. *Royal Bus. Funds Corp. v. South E. Dev. Corp.*, 32 N.C. App. 362, 232 S.E.2d 215, cert. denied, 292 N.C. 728, 235 S.E.2d 784 (1977).

Effect of Failure to Comply with Statutory Registration Requirements. — Where defendants were required by § 55-13 to maintain a registered office and registered agent, their failure to do so caused the process to be twice returned without personal service and had they conformed to the statutory requirements, both methods of service would have resulted in their receiving actual notice of the lawsuit, the notice given (attempted personal service on the Secretary of State) was in fact reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections. Accordingly, the service upon the Secretary of State was constitutionally valid and the trial court acquired in personam jurisdiction over the North Carolina corporations. *Royal Bus. Funds Corp. v. South E. Dev. Corp.*, 32 N.C. App. 362, 232 S.E.2d 215, cert. denied, 292 N.C. 728, 235 S.E.2d 784 (1977).

Service after Forfeiture of Charter. — The continuance of corporate existence by former § 55-132 made service of process on a corporation after it had been adjudged a bankrupt and its charter forfeited reasonable notice and a valid service. *Sisk v. Old Hickory Motor Freight*, 222 N.C. 631, 24 S.E.2d 488 (1943).

§ 55-16. Bylaws.

(a) The initial bylaws may be adopted by the board of directors at its organization meeting. Thereafter bylaws may be adopted, amended or repealed either by the shareholders or by the board of directors, but

- (1) No bylaw adopted or amended by the shareholders shall be altered or repealed by the board of directors, except where the charter or a bylaw adopted or approved by the shareholders authorizes the board of directors to adopt, amend or repeal the bylaws;
- (2) Any bylaw changing the statutory requirement for a quorum of directors or action by directors, as permitted by G.S. 55-28(d), or changing the statutory requirement for a quorum of shareholders or action by shareholders, as permitted by G.S. 55-65 and 55-66, may be adopted only by the shareholders, and any such bylaw can itself be amended or repealed only by the shareholders acting pursuant to any different quorum and greater vote so prescribed;
- (3) No bylaw authorizing compensation of officers measured by the amount of a corporation's income or volume of business shall be valid after five years from its adoption unless renewed by the vote of the holders of a majority of the outstanding shares regardless of limitation on voting rights;
- (4) The charter or a bylaw adopted by the shareholders may limit or eliminate the power of the board of directors to adopt, amend or repeal the bylaws or any specific bylaw.

(b) Any bylaw made by the board of directors shall be adopted by an affirmative vote of a majority of the directors then holding office and any bylaw made by the shareholders shall, except as otherwise provided in paragraph (3) of subsection (a) of this section, be adopted by the affirmative vote of the shareholders entitled to exercise a majority of the voting power of the corporation. However, the charter or the bylaws may, subject to the provisions of paragraph (2) of subsection (a) of this section, require more than the aforesaid majorities on the part of the directors or of the shareholders, as the case may be.

(c) The bylaws may contain any provisions for the regulation and management of the affairs of the corporation, including the transfer of its shares, and restrictions on such transfer, not inconsistent with the law or the charter. (1955, c. 1371, s. 1; 1959, c. 1316, ss. 2, 3; 1973, c. 469, s. 4.)

Legal Periodicals. — For article discussing this section, see 34 N.C.L. Rev. 432 (1956).

For note on unanimous approval of corporate

bylaws and creation of shareholder agreements, see 1 Campbell L. Rev. 153 (1979).

CASE NOTES

Statutory Norms Control Amendments Where Bylaws Fail to Control. — In the absence of a valid provision in the charter or bylaws controlling amendment, statutory or common-law norms governing amendment apply. *Blount v. Taft*, 295 N.C. 472, 246 S.E.2d 763 (1978).

Shareholders' agreement which is part of the charter or bylaws is subject to amendment as provided therein or, in the absence of an internal provision governing amendments, as provided by the statutory norms. *Blount v. Taft*, 295 N.C. 472, 246 S.E.2d 763 (1978).

When parties to a shareholders' agreement choose to embody it in the charter or bylaws, it must be concluded that they intended for statutory or common-law norms governing amendment to apply absent an expressed intention to

deviate from them. *Blount v. Taft*, 295 N.C. 472, 246 S.E.2d 763 (1978).

Principle by which a shareholder is bound by a corporate resolution, regularly passed pursuant to its charter and bylaws, prevails only in reference to his status and rights as a shareholder, and not where he deals independently with it as one of its customers in the line of its business. *Cardwell v. Garrison*, 179 N.C. 476, 103 S.E. 3 (1920).

Bylaws as Evidence against Strangers. — The bylaws of the corporation are usually not evidence for it against strangers who deal with it, unless brought home to their knowledge and assented to by them. *Smith v. N.C.R.R.*, 68 N.C. 107 (1873).

Applied in *Blount v. Taft*, 29 N.C. App. 626, 225 S.E.2d 583 (1976).

ARTICLE 4.

*Powers and Management.***§ 55-17. General powers.**

- (a) Each corporation shall have power:
- (1) To have perpetual succession by its corporate name unless a limited period of duration is stated in its charter.
 - (2) To sue and be sued, complain and defend, in its corporate name.
 - (3) To have a corporate seal which may be altered at will, and to use the same by causing it, or a facsimile thereof, to be impressed or affixed or in any other manner reproduced.
 - (4) To elect or appoint officers and agents of the corporation, and define their duties and fix their compensation.
 - (5) To make and alter bylaws, not inconsistent with its charter or with the laws of this State, for the administration and regulation of the affairs of the corporation.
 - (6) To make contributions or gifts to corporations, trusts, community chests, funds, foundations, or associations organized and operated exclusively for religious, charitable, literary, scientific, or educational, cultural or artistic purposes, or for public welfare, or for the prevention of cruelty to children or animals, no part of the net earnings of which inures to the benefit of any private stockholder or individual, when such contributions or gifts are authorized or approved by its board of directors.
 - (7) In time of war or engagement of the nation's armed forces in hostile military operations, to transact any lawful business in aid of the United States in connection therewith.
 - (8) To invest its funds not currently needed in its business.
 - (9) To cease its corporate activities and surrender its corporate franchise.
 - (10) To pay pensions and establish pension plans, pension trusts, profit-sharing plans, stock bonus plans and other incentive plans for its officers, directors and employees.
- (b) In connection with carrying out the purposes stated in its charter, and subject to any limitation prescribed by this Chapter or by its charter, every corporation shall also have power:
- (1) To acquire, by purchase, lease, gift, will or otherwise, and to own, hold, improve, use and otherwise deal in and with, real and personal property, or any interest therein, wherever situated.
 - (2) To sell, convey, mortgage, pledge, lease, exchange, transfer and otherwise dispose of all or any part of its property and assets.
 - (3) To enter into contracts of guaranty or suretyship or make other financial arrangements for the benefit of any person, firm or corporation.
 - (4) To provide insurance for its benefit on the life or physical or mental ability of any of its officers or employees or on the life or physical or mental ability of any security holder for the purpose of acquiring at his death or disability its securities owned by such security holder, and for these purposes the corporation is deemed to have an insurable interest in its officers, employees, or security holders; and to provide insurance for its benefit on the life or physical or mental ability of any other person in whom it has an insurable interest.
 - (5) To acquire, by purchase, subscription, gift, will or otherwise, and to own, hold, vote, use, employ, sell, mortgage, lend, pledge, or otherwise dispose of, and otherwise use and deal in and with, shares or other interests in, or obligations of, other domestic or foreign corporations,

associations, partnerships or individuals, or direct or indirect obligations of the United States or of any government, state, territory, governmental district or municipality or of any instrumentality thereof.

- (6) To enter into any arrangement with others for the sharing of profits or union of interest with respect to any transaction, operation or venture which the corporation has power to conduct by itself, even if such arrangement involves sharing or delegation of control of such transaction, operation or venture with or to others.
- (7) To make contracts and incur liabilities, borrow money, issue its notes, bonds, and other obligations, and secure any of its obligations by mortgage or pledge or other form of security upon all or any of its property, franchises and income.
- (8) To lend money for its corporate purposes, invest its funds from time to time, and take and hold real and personal property as security for the payment of funds so loaned or invested.
- (9) To conduct its business, carry on its operations, and have offices and exercise the powers granted by this Chapter anywhere in the world.
- (10) To have and exercise all powers necessary or convenient to effect any or all of the purposes for which the corporation is organized.

(c) It shall not be necessary to set forth in the charter any of the powers enumerated in this section. (Code, ss. 663, 666, 691, 692, 693; 1893, c. 159; 1901, c. 2, s. 1; Rev., s. 1128; 1909, c. 507, s. 1; C.S., s. 1126; 1925, cc. 235, 298; 1929, c. 269; 1939, c. 279; 1945, c. 775; G.S., s. 55-26; 1951, c. 1240, s. 1; 1955, c. 1371, s. 1; 1959, c. 1316, ss. 4, 5; 1969, c. 751, ss. 7, 8.)

I. In General.

II. Suits by and against Corporations.

III. Rights as to Property.

IV. Corporate Seal.

I. IN GENERAL.

Editor's Note. — Some of the following cases were decided under former §§ 55-26 and 55-28.

Implied Powers Necessary to Exercise of Express Powers. — Corporations possess by legal implication such powers as are essential to the exercise of the powers expressly conferred and necessary to attain the main objects for which they were formed. *Barcello v. Hapgood*, 118 N.C. 712, 24 S.E. 124 (1896).

Corporation may transact business anywhere, unless prohibited by its charter or excluded by local laws. *Garrett v. Bear*, 144 N.C. 23, 56 S.E. 479 (1907).

Ratification of and Liability for Pre-Incorporation Contract. — Although a corporation may not technically ratify a contract made on its behalf prior to its incorporation, since it could not at that time have authorized such action on its behalf, it may, after it comes into existence, adopt such contract by its corporate action, which adoption may be express or implied, and thereby become liable for its performance. *Smith v. Ford Motor Co.*, 289 N.C. 71, 221 S.E.2d 282 (1976).

Cited in Pilot Title Ins. Co. v. Northwestern Bank, 11 N.C. App. 444, 181 S.E.2d 799 (1971); *Burlington Indus., Inc. v. Foil*, 284 N.C. 740, 202 S.E.2d 591 (1974).

II. SUITS BY AND AGAINST CORPORATIONS.

Same Liability as Natural Person. — A corporation is now held liable to civil and criminal actions under the same conditions and circumstances as natural persons are. *Reddit v. Singer Mfg. Co.*, 124 N.C. 100, 32 S.E. 392 (1899).

Liability for Slander. — A corporation may be held liable for slander when the defamatory words are uttered by express authority of the company or by one of its officers or agents in the course of his employment, and authority for their utterances may be fairly and reasonably inferred under relevant and sufficient circumstances. *Cotton v. Fisheries Prods. Co.*, 177 N.C. 56, 97 S.E. 712 (1919).

Ejectment and Trespass Will Lie Against Corporation. — Corporations, in contemplation of the law, are capable of having actual possession of the land, and whatever may have been supposed to the contrary in the distant past, the actions of ejectment and trespass lie against them. *Young v. Barden*, 90 N.C. 424 (1884).

Personal Liability of Corporate Officer for Pre-Incorporation Note Executed in Another State. — In an action to recover on a promissory note executed in Georgia and pay-

able in Georgia, Georgia law applied so that defendant could be held personally liable on the note which he executed as president of a corporation which had not yet been formed, but which was subsequently incorporated and which made payments on the note until default. *Smith v. Morgan*, 50 N.C. App. 208, 272 S.E.2d 602 (1980).

Suits Must Be in Corporate Name. — A suit against a corporation must be brought against it in its corporate name, and not against its officers or agents. *Britain v. Newland*, 19 N.C. 363 (1837); *Young v. Barden*, 90 N.C. 424 (1884).

Unless Corporation Insolvent. — However, in case of insolvency, where a receiver has been appointed, he may sue either in his own name or in that of the corporation. *Davis v. Industrial Mfg. Co.*, 114 N.C. 321, 19 S.E. 371 (1894); *Smathers v. Bank*, 135 N.C. 410, 47 S.E. 893 (1904).

Misnomer Immaterial. — A misnomer does not vitiate, provided the identity of the corporation with that intended by the parties is apparent, whether it is in a deed, or in a judgment, or in a criminal proceeding. *McCrea v. Starr*, 5 N.C. 252 (1809); *Asheville Div. No. 15, Sons of Temperance v. Aston*, 92 N.C. 579 (1885); *Gordon v. Pintsch Gas Co.*, 178 N.C. 435, 100 S.E. 878 (1919).

III. RIGHTS AS TO PROPERTY.

Property of a corporation belongs to it, not to the stockholders. They only have an interest in such property through their relation to the company, and in this respect the State is like any other stockholder. *Marshall v. Western N.C.R.R.*, 92 N.C. 322 (1885).

Where the State is a stockholder in a railroad company, it is bound by the provisions of the charter in the same manner as an individual. It has no advantage as a stockholder on account of its sovereignty, for, by becoming such, it lays aside its character as a sovereign and places itself on a footing of equality with the individual stockholders. *Marshall v. Western N.C.R.R.*, 92 N.C. 322 (1885).

Corporation May Hold Estates in Fee. — Although the existence of a corporation be limited to a certain number of years, yet the corporation is capable of holding estates in fee. *Asheville Div. No. 15, Sons of Temperance v. Aston*, 92 N.C. 578 (1885).

Effect of Conveyance for Use Beyond Corporate Powers. — Where a corporation takes a conveyance of lands for use beyond its charter powers, the deed is not void, but only voidable upon the objection of the State. *Cross v. Seaboard Air Line Ry.*, 172 N.C. 119, 90 S.E. 14 (1916).

Private corporation may dispose of its property without express authority of the leg-

islature. *Benbow v. Cook*, 115 N.C. 324, 20 S.E. 453 (1894).

A strictly private corporation can lawfully sell any of its property, real or personal, just as an individual can. *Barcello v. Hapgood*, 118 N.C. 712, 24 S.E. 124 (1896).

A corporation chartered for the purpose of mining and milling ores has the right, by implication of law, to buy and sell real estate essential to the successful prosecution of its business. *Barcello v. Hapgood*, 118 N.C. 712, 24 S.E. 124 (1896).

Necessity for Authorization by Directors to Sell Corporate Property. — Corporate directors are trustees of its property, and usually a corporation may sell, transfer, and convey its corporate real estate only when authorized to do so by its board of directors. And the statutory provisions may be supplemented by stipulation in the corporation's bylaws. *Tuttle v. Junior Bldg. Corp.*, 228 N.C. 507, 46 S.E.2d 313 (1948).

In the absence of charter provisions or bylaws to the contrary, the president of a corporation is the general manager of its corporate affairs, and his contracts made in the name of the corporation in the general course of business and within the apparent scope of his authority are ordinarily enforceable, but ordinarily he has no power to sell or contract to sell the real or personal property of the corporation without authority from its board of directors. *Tuttle v. Junior Bldg. Corp.*, 228 N.C. 507, 46 S.E.2d 313 (1948).

Right to Mortgage Property. — Corporations other than railroad companies have a general power to mortgage their property, unless prohibited by some provision in the charter, the right to mortgage being a natural result of the right to incur an indebtedness. *Antietam Paper Co. v. Chronical Publishing Co.*, 115 N.C. 143, 20 S.E. 366 (1894).

Corporation may acquire land by showing sufficient adverse possession for the statutory period. *Cross v. Seaboard Air Line Ry.*, 172 N.C. 119, 90 S.E. 14 (1916).

IV. CORPORATE SEAL.

Power to have a common seal and to alter or renew the same at will is frequently conferred on corporations by statute, but such power is one of the incidental and implied powers of every corporation when not expressly conferred. *Bailey v. Hassell*, 184 N.C. 450, 115 S.E. 166 (1922).

As a general rule, a corporation may use or adopt any seal. *Security Nat'l Bank v. Educators Mut. Life Ins. Co.*, 265 N.C. 86, 143 S.E.2d 270 (1965).

And May Adopt Seal for Special Occasion. — If a corporation adopts a seal different from its corporate seal for a special occasion, or

if it has no corporate seal, the seal adopted is the corporate seal for the time and the occasion. *Security Nat'l Bank v. Educators Mut. Life Ins. Co.*, 265 N.C. 86, 143 S.E.2d 270 (1965).

Any Device May Be Used for Seal. — While it is required for the sufficiency of the deed of a corporation to convey its lands that the corporate seal should be affixed to the instrument, any device used for the corporate seal will be sufficient, provided it was intended for and used as the seal of the corporation, and had been adopted by proper action of the corporation for that purpose. *Bailey v. Hassell*, 184 N.C. 450, 115 S.E. 166 (1922).

A corporate seal may consist of anything found upon a paper and which appears to have been put there by due authority or to have been adopted and used by such authority as and for the seal of the corporation. *Security Nat'l Bank v. Educators Mut. Life Ins. Co.*, 265 N.C. 86, 143 S.E.2d 270 (1965).

The simple word "seal" with a scroll adopted as the seal of a corporation and used by

it on a deed to its lands according to resolutions of the stockholders and directors thereof at separate meetings held for the purpose, when all were present, is sufficient. *Bailey v. Hassell*, 184 N.C. 450, 115 S.E. 166 (1922).

Burden of Proof as to Seal on Contract and Statute of Limitations. — The burden is upon plaintiffs to prove that the action accrued within the time limited by § 1-47, by showing that the company adopted the seal appearing on the contract for the special occasion or for all similar occasions, or that such seal became the seal of the corporation by reason of some other rule of law, or that the regular corporate seal was impressed or attached to the original of the contract, or that there are facts and circumstances which exclude the operation of the 3-year statute, § 1-52, other than the matter of a seal. *Security Nat'l Bank v. Educators Mut. Life Ins. Co.*, 265 N.C. 86, 143 S.E.2d 270 (1965).

§ 55-18. Defense of ultra vires.

(a) No act of a corporation and no conveyance or transfer of real or personal property to or by a corporation shall be invalid by reason of the fact that the corporation was without capacity or power to do such act or to make or receive such conveyance or transfer, but such lack of capacity or power may be asserted:

- (1) In an action by a shareholder against the corporation to enjoin the doing of any act or the transfer of real and personal property by or to the corporation, but in any such action the plaintiff shall sustain the burden of proof that he has not at any time prior thereto assented to the act or transfer in question and that in bringing the action he is not acting in collusion with officials of the corporation. If the unauthorized acts or transfer sought to be enjoined are being, or are to be, performed or made pursuant to any contract to which the corporation is a party, the court may, if all of the parties to the contract are parties to the action and if deemed equitable, set aside and enjoin the performance of such contract, and in so doing may allow to the corporation or to the other parties to the contract, as the case may be, compensation for the loss or damage sustained by either of them which may result from the action of the court in setting aside and enjoining the performance of such contract, but anticipated profits to be derived from the performance of the contract shall not be awarded by the court as loss or damage sustained.
- (2) In an action by the corporation or by its receiver, trustee or other legal representative, or by its shareholders in a derivative suit, against the incumbent or former officers or directors of the corporation.
- (3) In an action by the Attorney General, as provided in this Chapter, to dissolve the corporation, or in an action by the Attorney General to enjoin the corporation from the transaction of unauthorized business, or in a proceeding by the Secretary of State to revoke a certificate of authority of a foreign corporation pursuant to G.S. 55-151.

(b) This section applies to acts, conveyances and transfers done or made by a foreign corporation in this State and to all conveyances to or by a foreign corporation of real property situated in this State, but if the foreign corporation

is itself disqualified by this Chapter from maintaining an action in this State no action may be brought in this State under paragraph (1) of subsection (a) of this section. (Code, ss. 607, 686; 1901, c. 2, s. 107; Rev., s. 1197; C.S., s. 1143; G.S., 55-47; 1955, c. 1371, s. 1.)

CASE NOTES

Doctrine of ultra vires has been very much modified, and many contracts made in the course of business, especially when executed and benefits are received or liabilities are incurred, will be upheld and enforced which were once declared absolutely void. *Hutchins v. Bank*, 128 N.C. 72, 38 S.E. 252 (1901).

This section has curtailed to a considerable degree the doctrine of ultra vires. *Piedmont Aviation, Inc. v. S & W Motor Lines*, 262 N.C. 135, 136 S.E.2d 658 (1964).

Question whether acts are ultra vires is a conclusion of law to be drawn from the facts stated. *Spencer v. Railroad*, 137 N.C. 107, 49 S.E. 96 (1904).

State May Enjoin Threatened Ultra Vires

Act. — This modification of the doctrine does not involve the right in an appropriate case of the State to enjoin a threatened ultra vires act. *Victor v. Louise Cotton Mills*, 148 N.C. 107, 61 S.E. 648 (1908).

Stockholder May Bring Action. — If an act of a corporation is ultra vires, any one or more stockholders may by some appropriate method call it in question, and, unless by having consented to or acquiesced in it he is barred, have relief. *Victor v. Louise Cotton Mills*, 148 N.C. 107, 61 S.E. 648 (1908); *Lutterloh v. City of Fayetteville*, 149 N.C. 65, 62 S.E. 758 (1908).

Applied in *Everette v. D.O. Briggs Lumber Co.*, 250 N.C. 688, 110 S.E.2d 288 (1959).

§ 55-19. Indemnification of directors, officers, employees or agents; general provisions.

(a) Except as indemnification of a director or officer of a corporation is permitted by this section or by G.S. 55-20 and 55-21, no provision, hereafter made or adopted, whether contained in the charter, the bylaws, a resolution, a contract or otherwise, whereby the corporation purports to exempt or indemnify any director or officer of a corporation with respect to any liability or litigation expenses arising out of his activities as director or officer shall be valid.

(b) As used in this section and in G.S. 55-20 and 55-21, the term "officer" includes any dominant shareholder engaged to perform services for the corporation, whether as employee or independent contractor; and the term "person" includes the legal representative of such person.

(c) Anything in this section or in G.S. 55-20 or 55-21 to the contrary notwithstanding, a corporation shall have power to purchase and maintain insurance on behalf of any person who is or was a director, officer, employee or agent of the corporation, or is or was serving at the request of the corporation as a director, officer, employee or agent of another corporation, partnership, joint venture, trust or other enterprise against any liability asserted against him and incurred by him in any such capacity, or arising out of his status as such, whether or not the corporation would have the power to indemnify him against such liability.

(d) Expenses incurred by a director, officer, employee or agent in defending a civil or criminal action, suit or proceeding may be paid by the corporation in advance of the final disposition of such action, suit or proceeding as authorized by the board of directors in the specific case upon receipt of an undertaking by or on behalf of the director, officer, employee or agent to repay such amount unless it shall ultimately be determined that he is entitled to be indemnified by the corporation as authorized in this section or in G.S. 55-20 or 55-21. (1955, c. 1371, s. 1; 1969, c. 797, s. 1; 1973, c. 469, s. 5.)

Legal Periodicals. — For survey of 1977 law on business associations, see 56 N.C.L. Rev. 939 (1977).

CASE NOTES

"Undertaking" Defined. — The "undertaking" required by subsection (d) of this section for the repayment of fees advanced if the director is unsuccessful is just that: a written promise, not made under seal, given as security for the performance of some act as required in a legal proceeding. *Swenson v. Thibaut*, 39 N.C. App. 77, 250 S.E.2d 279 (1978), cert. denied and appeal dismissed, 296 N.C. 740, 254 S.E.2d 181, 182, 183 (1979).

Legal Fees May Be Advanced for Defense of Derivative Action. — In a derivative action brought by shareholders against directors of a

corporation alleging malfeasance in office, § 55-30 did not operate to prevent subsection (d) of this section from being effective in allowing the corporation to advance any legal fees to the directors, since the advancement of legal fees under that subsection is not necessarily a transaction in which a director is adversely interested, and since, even if it were, the disinterested directors of the corporation had approved the advancement. *Swenson v. Thibaut*, 39 N.C. App. 77, 250 S.E.2d 279 (1978), cert. denied and appeal dismissed, 296 N.C. 740, 254 S.E.2d 181, 182, 183 (1979).

§ 55-20. Indemnification in actions by outsiders.

(a) When by reason of the fact that he is or was serving as director, officer, employee or agent of a corporation, or in any such capacity at the request of the corporation in any other corporation, partnership, joint venture, trust or other enterprise, any person is or was a party or is threatened to be made a party to any threatened, pending or completed action, suit or proceedings, whether civil, criminal, administrative or investigative, not brought by the corporation nor brought by any party seeking derivatively to enforce a liability of such a person to the corporation, such person shall be entitled to indemnification or reimbursement by the corporation for any expenses, including attorneys' fees, or any liabilities which he may have incurred in consequence of such action, suit or proceeding, under the following conditions:

- (1) If such person is wholly successful in his defense on the merits, or if the proceeding is an administrative or investigative proceeding which does not result in the indictment, fine or penalty of such person, he shall be entitled to reimbursement from the corporation of all his reasonable expenses of defense or participation, including attorneys' fees.
- (2) If such person is wholly successful in his defense otherwise than solely on the merits, the corporation may pay or agree to pay to him such expenses of defense or participation, including attorneys' fees, as the board of directors in good faith shall deem reasonable, regardless of any adverse interest of any or all of the directors.
- (3) If such person is not wholly successful or is unsuccessful in his defense, or the proceeding to which he is a party results in his indictment, fine or penalty, the corporation may pay or agree to pay, in whole or in part, such expenses of defense or participation, including attorneys' fees, and the amount of any judgment, money decree, fine, penalty or settlement for which he may have become liable, if
 - a. A plan for such payment is approved by a consent in writing signed by the holders of all shares entitled to vote or such plan is sent to the holders of all shares entitled to vote, with notice of a shareholders' meeting, whether annual or special, to be held to take action thereon and if at such meeting a plan is approved by the holders of a majority of such shares, exclusive of the shares held directly or indirectly by any persons to be benefited by the plan if approved, or

- b. A majority of a quorum consisting of directors who are not parties to such action, suit or proceeding shall determine that such person acted in good faith and in a manner he reasonably believed to be in or not opposed to the best interests of the corporation, and, with respect to any criminal action or proceeding, had no reasonable cause to believe his conduct was unlawful, and the corporation shall, not later than 60 days before any such payment or agreement to pay is made, send to all shareholders of record on a record date not more than 10 days prior to the date of mailing, at their registered addresses, a statement specifying the persons to be paid, the amounts to be paid, and the nature and status of the suit or proceedings at the time of mailing.
- c. In a proceeding brought by such person for such determination in the superior court of the district where the corporation has its registered office it shall be determined that such person acted in good faith and in a manner he reasonably believed to be in or not opposed to the best interests of the corporation, and, with respect to any criminal action or proceeding, had no reasonable cause to believe his conduct was unlawful. In such a proceeding, the court in its discretion may order notice thereof to be sent to the shareholders of the corporation in such manner and in such form as it may deem appropriate, at the expense of the corporation; and it may allow all shareholders so notified to be heard in opposition to the determination requested.

(b) The termination of any action, suit or proceeding by judgment, order, settlement, conviction, or upon a plea of nolo contendere or its equivalent, shall not, of itself, create a presumption that the person did not act in good faith and in a manner which he reasonably believed to be in the best interests of the corporation, and, with respect to any criminal action or proceeding, had reasonable cause to believe that his conduct was unlawful. (1955, c. 1371, s. 1; 1969, c. 797, s. 2; 1973, c. 469, s. 6.)

§ 55-21. Indemnity for litigation expenses in corporate action.

(a) When a present or former director, officer, employee or agent of a corporation or any person who has served or is serving in such capacity at the request of the corporation in any other corporation, partnership, joint venture, trust or other enterprise, is sued, alone or with others, in the courts of this State, in any action seeking to establish his liability to the corporation arising out of his alleged dereliction of duty to the corporation, he shall in turn be entitled to indemnification or reimbursement from the corporation for so much of his expenses of defense, including attorneys' fees, as the court in its discretion, upon motion for indemnification or reimbursement, duly made in such action, finds to be reasonable, if:

- (1) Such person is successful in whole or in part in the action against him or in any settlement thereof and the court finds that his conduct fairly and equitably merits such relief; or
- (2) The court finds, despite his adjudication of liability, that such person has acted honestly and reasonably and that, in view of all the circumstances of the case, his conduct fairly and equitably merits such relief.

(b) When such action is brought in another state and the result thereof is such as would have entitled the defendant officer or director to make a motion in the cause for indemnification or reimbursement of his expenses of defense under subsection (a) of this section if the action had been brought in this State, but no such relief is available in the state in which the action is actually

brought, the defendant officer or director may bring a separate action against the corporation in this State for such indemnification or reimbursement as he might have recovered had the suit against him been brought in this State. Notice of said action for indemnification or reimbursement shall be sent, in such form as the court may approve and at the corporation's expense, to the party or parties plaintiff in the prior action who shall be entitled to be heard.

(c) Whenever indemnification or reimbursement as permitted in this section is sought, the court may in its discretion order notice of the claim thereof to be sent to the shareholders in such manner and in such form as it may approve, at the expense of the corporation. All shareholders so notified may be heard in opposition to the relief requested. (1955, c. 1371, s. 1; 1969, c. 797, s. 3.)

§ 55-22. Loans and guaranties.

(a) Subject to the provisions of subsection (b) hereof, except with the consent of the holders of a majority of all the shares outstanding, regardless of limitation on voting rights, other than the shares held by the adversely interested party, a corporation shall not, directly or indirectly, make any loan of money or property to, or guarantee or otherwise secure the obligation of:

- (1) Any directors or officers of the corporation; or
- (2) Any corporation of which the officers and directors of the lending or securing corporation own more than fifty percent (50%) of the outstanding securities of any class; or
- (3) Any dominant shareholder or any other corporation of which said shareholder is a dominant shareholder, unless that corporation is a subsidiary of the lending or securing corporation; or
- (4) Any person upon the security of the shares of any corporation mentioned in subdivisions (2) and (3) of this subsection. A sale on credit in the ordinary course of business is not a loan within the meaning of this section.

(b) If all shareholders, regardless of limitation on voting rights, are adversely interested in the proposed loan, guaranty, or other form of security, such transaction may be entered into by the corporation only with the consent of all such shareholders.

(c) The provisions of this section do not apply to loans, guaranties, or other forms of security extended by banks, industrial banks, building and loan associations, land and loan associations, credit unions or insurance companies, or to loans permitted under any statute regulating any special class of corporations. (1955, c. 1371, s. 1; 1959, c. 1316, s. 6; 1961, c. 198; 1969, c. 751, s. 9.)

Cross References. — For definition of dominant shareholder, parent corporation and subsidiary corporation, see § 55-2, subdivisions (6) and (9).

CASE NOTES

Cited in Burlington Indus., Inc. v. Foil, 284 N.C. 740, 202 S.E.2d 591 (1974); Lowder v. All Star Mills, Inc., 301 N.C. 561, 273 S.E.2d 247 (1981).

§ 55-23: Omitted.

§ 55-24. Board of directors.

(a) Subject to the provisions of the charter, the bylaws or agreements between the shareholders otherwise lawful, the business and affairs of a corporation shall be managed by a board of directors.

(b) No limitation upon the authority which the directors would have in the absence of such limitation, whether contained in the charter or the bylaws or otherwise, shall be effective against other persons without actual knowledge of such limitation.

(c) The directors need not be residents of this State or shareholders of the corporation unless the charter or the bylaws so require. The charter or the bylaws may prescribe other qualifications for directors. (1955, c. 1371, s. 1.)

Cross References. As to shareholders' agreements, see § 55-73.

Legal Periodicals. — For survey of 1980 commercial law, see 59 N.C.L. Rev. 1086 (1981).

CASE NOTES

Editor's Note. — Many of the cases cited below were decided under former statutory provisions.

Director occupies a fiduciary relation to the company which, by virtue of his office, he represents in the management of its principal functions. *Hill v. Pioneer Lumber Co.*, 113 N.C. 173, 18 S.E. 107 (1893).

Directors are to be considered and dealt with as trustees or quasi trustees. *Besseliew v. Brown*, 177 N.C. 65, 97 S.E. 743 (1919).

Liability for Gross Mismanagement and Neglect. — Good faith alone will not relieve the directors of a corporation from liability to its creditors for damages caused them by their gross mismanagement and neglect of its affairs. *Anthony v. Jeffress*, 172 N.C. 378, 90 S.E. 414 (1916).

Duty of Care. — Directors are not, as a rule, responsible for mere errors of judgment nor for slight omissions from which the loss complained of could not have been reasonably expected; but where they accept these positions of trust they are expected and required to give them the care and attention that a prudent man should exercise in like circumstances, and are charged with a like duty, usually the care that a prudent man shows in the conduct of his own affairs of a similar kind. *Besseliew v. Brown*, 177 N.C. 65, 97 S.E. 743 (1919).

Same Good Faith Required of Promoters as Directors. — The promoters of a corporation occupy a relation of trust and confidence towards the corporation which they are calling into existence as well as to each other and the law requires of them the same good faith it exacts from directors and other fiduciaries. *Wilson v. McClenny*, 262 N.C. 121, 136 S.E.2d 569 (1964).

Right of Corporation to Sue Negligent Directors. — Where the directors or managing officers of a corporation are liable in damages for their willful or negligent failure to exercise the care and attention to the corporate affairs entrusted to them and which they have assumed, an action will lie against them in favor of the corporation, and in case of its insolvency and receivership, in favor of its

receiver. *Besseliew v. Brown*, 177 N.C. 65, 97 S.E. 743 (1919).

Directors Establish Policies. — In general, the directors establish corporate policies and supervise the carrying out of those policies through their duly elected and authorized officers. *Burlington Indus., Inc. v. Foil*, 284 N.C. 740, 202 S.E.2d 591 (1974).

Powers to Borrow Money and Encumber Property. — The directors of a corporation, unless they are specially restrained by the charter or bylaws, have the power to borrow money with which to conduct its business and to secure payment by mortgage on the corporate property. *Wall v. Rothrock*, 171 N.C. 388, 88 S.E. 633 (1916).

Director of a company may lend it money when needed for its benefit, and take a lien upon the corporate property as security for its repayment, provided the transaction is open and entirely fair and capable of strict proof as to its bona fides. *Hill v. Pioneer Lumber Co.*, 113 N.C. 173, 18 S.E. 107 (1893).

Director who is also a creditor of a corporation cannot prefer himself to the other creditors in the application of its assets to the security or payment of its debts. *Hill v. Pioneer Lumber Co.*, 113 N.C. 173, 18 S.E. 107 (1893); *Merchants Nat'l Bank v. Newton Cotton Mills*, 115 N.C. 507, 20 S.E. 765 (1894); *McIver v. Young Hdwe. Co.*, 144 N.C. 478, 57 S.E. 169 (1907).

Right of Directors to Security. — By taking a mortgage on corporate property, when the corporation is in failing circumstances, directors, occupying a fiduciary relation, are not permitted to secure themselves against preexisting liabilities of the corporation upon which they are already bound. *Wall v. Rothrock*, 171 N.C. 388, 88 S.E. 633 (1916); *Caldwell v. Robinson*, 179 N.C. 518, 103 S.E. 75 (1920).

Judgment Liens of Directors. — Where the directors of a corporation made a bona fide sale of property to it, for value and free from fraud, judgments against the corporation for the purchase price, duly docketed, constitute liens in favor of the directors against the corpo-

rate property. *Caldwell v. Robinson*, 179 N.C. 518, 103 S.E. 75 (1920).

Use of Inside Information by Director to Gain Advantage against Other Creditors.

— Where a corporation is insolvent a director who is a creditor cannot, upon a debt theretofore existing, take advantage of his superior means of information to secure his debt as against other creditors. *Hill v. Pioneer Lumber Co.*, 113 N.C. 173, 18 S.E. 107 (1893).

Stockholder's Agreements on Election of Directors Are Valid Absent Fraud or Prejudice.

— This Chapter clearly aligns North Carolina with the majority of jurisdictions which hold that a contract entered into between corporate stockholders by which they agree to vote their stock in a specified manner — including agreements for the election of directors and corporate officers — is not invalid unless it is inspired by fraud or will prejudice the other stockholders. *Wilson v. McClenny*, 262 N.C.

121, 136 S.E.2d 569 (1964).

Agreements for Future Management Must Be "Otherwise Lawful". — Both this section and § 55-73 require that contemplated agreements providing for the future management and control of a corporation be "otherwise lawful." *Wilson v. McClenny*, 262 N.C. 121, 136 S.E.2d 569 (1964).

When Such Agreements Will Be Declared Invalid.

— Agreements providing for the future management and control of a corporation which violate the express charter or statutory provision, contemplate an illegal object, involve any fraud, oppression or wrong against other stockholders, or are made in consideration of a private benefit to the promisor will be declared invalid. *Wilson v. McClenny*, 262 N.C. 121, 136 S.E.2d 569 (1964).

Cited in *Blount v. Taft*, 295 N.C. 472, 246 S.E.2d 763 (1978).

§ 55-25. Number, election and term of directors.

(a) The number constituting the board of directors shall not be fewer than three, except that the initial board of directors fixed by the articles of incorporation may be fewer than three until the issuance of shares and except also that if and so long as all the shares of a corporation are owned of record by either one or two shareholders the number of directors may be fewer than three but not fewer than the number of such shareholders. The number constituting the initial board of directors shall be fixed by the articles of incorporation. In the absence of a provision in the articles of incorporation, the charter, or the bylaws fixing the number of directors, the number shall be the same as that fixed in the articles of incorporation for the initial board of directors, subject to the provisions of this section. The articles of incorporation, the charter, or the bylaws may provide for a maximum and minimum number of directors, and, if so, shall designate the manner in which such number shall from time to time be determined. If the fixing of a maximum and minimum number of directors is authorized, the articles of incorporation, the charter, or the bylaws may provide that any directorships not filled by the shareholders shall be treated as vacancies to be filled by and in the discretion of the board of directors.

(b) The number of directors may be increased or decreased from time to time only by amendment to the charter or to the bylaws adopted by the shareholders, but no such decrease shall be made when the number of shares voting against the proposal for decrease would be sufficient to elect a director if such shares could be voted cumulatively at an annual election. Whenever a class or a series of shares is entitled to elect one or more directors under authority granted by the charter, the provisions of this paragraph apply to the vote of that class or series for such election and not to the vote of the outstanding shares as a whole.

(c) The first board of directors shall consist of those named in the articles of incorporation. Thereafter directors shall be elected at the first meeting of the shareholders held for that purpose and at each subsequent annual meeting.

(d) Each director shall hold office for the term for which he is elected and until his successor shall have been elected and qualified.

(e) If any shareholder so demands, election of directors by the shareholders shall be by ballot, unless the charter or the bylaws otherwise provide.

(f) The number of votes necessary to elect a director and the procedure for election of directors are governed by the provisions of G.S. 55-67(c). (1901, c. 2, ss. 14, 39; Rev., ss. 1147, 1182; C.S., ss. 1144, 1175; 1927, c. 138; G.S., ss. 55-48, 55-112; 1955, c. 1371, s. 1; 1959, c. 1316, s. 33; 1969, c. 751, ss. 10, 11.)

§ 55-26. Staggered board of directors.

When the board of directors shall consist of nine or more members, in lieu of electing the whole number of directors annually, it may be provided in the charter or in the bylaws adopted by the shareholders that the directors be staggered by division into either two or three classes, each class to be as nearly equal in number as possible, the term of office of directors of the first class to expire at the first annual meeting of shareholders after their election, that of the second class to expire at the second annual meeting after their election, and that of the third class, if any, to expire at the third annual meeting after their election. At each annual meeting after such classification the number of directors equal to the number of the class whose term expires at the time of such meeting shall be elected to hold office until the second succeeding annual meeting, if there be two classes, or until the third succeeding annual meeting, if there be three classes. No such classification of directors shall, unless made in the charter, be effective prior to the first annual meeting of shareholders. Boards of directors may also be classified otherwise than by staggering. Corporations having a lawfully staggered or otherwise classified board of directors when this Chapter goes into effect may continue their existing classification even though not conforming to this section. (1901, c. 2, ss. 14, 44; Rev., ss. 1147, 1148; C.S., s. 1144; 1937, c. 179; 1945, c. 200; 1949, c. 917; G.S., s. 55-48; 1955, c. 914, s. 1; c. 1371, s. 1; 1959, c. 1316, s. 7.)

§ 55-27. Vacancies and removal of directors.

(a) A vacancy in the board of directors exists:

- (1) Upon the death or removal of any director, or upon his resignation, which may, if in writing, include terms making it effective at a future date or upon the occurrence of a future event, or
- (2) If the authorized number of directors is increased, or
- (3) If, at any annual, regular, or special meeting of shareholders at which any director is elected, the shareholders fail to elect the full authorized number of directors to be voted for at that meeting, or
- (4) If a vacancy is declared as provided in subsection (b) of this section.

(b) The board of directors may declare vacant the office of a director who has been declared of unsound mind by an order of court, or finally convicted of felony, or adjudged a bankrupt.

(c) Unless the charter or the bylaws otherwise provide, vacancies may be filled by a majority of the remaining directors even though less than a quorum or by a sole remaining director. If a vacancy occurs with respect to a director who had been elected by the votes of a particular class of shares voting as a class, the vacancy shall be filled by the remaining directors or the remaining sole director elected by that class. A vacancy created by an increase in the authorized number of directors shall be filled only by election at an annual meeting or at a special meeting of shareholders called for that purpose, except as provided in G.S. 55-25(a).

(d) The shareholders, or a class thereof if directors are elected by classes of shareholders, may elect a director at any time to fill any vacancy not filled by the directors. In the case of a resignation of a director tendered to take effect at a future time, the board of directors or the shareholders may, at any time after such tender, elect a successor to take office when the resignation becomes effective.

(e) A reduction of the authorized number of directors does not of itself remove any director prior to the expiration of his term of office.

(f) Unless otherwise provided in the charter or a bylaw adopted by the shareholders, the entire board of directors or any individual director may be removed from office with or without cause by a vote of shareholders holding a majority of the outstanding shares entitled to vote at any election of directors. However, unless the entire board is removed, an individual director shall not be removed when the number of shares voting against the proposal for removal would be sufficient to elect a director if such shares could be voted cumulatively at an annual election. If any or all directors are so removed, new directors may be elected at the same meeting. Whenever a class or series of shares is entitled to elect one or more directors under authority granted by the charter the provisions of this subsection apply to the vote of that class or series as to those directors and not to the vote of the outstanding shares as a whole.

(g) The superior court of the county where the registered office or the principal place of business in this State is located may, at the suit of shareholders holding at least five percent (5%) of the number of outstanding shares with or without voting rights, remove from office any director in case of fraudulent or dishonest acts or gross abuse of authority or discretion in the discharge of his duties to the corporation, and may bar from reelection any director so removed for a period prescribed by the court. The corporation shall be made a party to such actions. (1955, c. 1371, s. 1; 1959, c. 1316, s. 34; 1973, c. 469, s. 7.)

§ 55-28. Directors' meetings.

(a) Meetings of the board of directors, regular or special, may be held either within or without this State.

(b) Unless the bylaws otherwise provide, special meetings of the board of directors may be called by the president or by any two directors.

(c) Regular meetings of the board of directors may be held with or without notice, as prescribed in the bylaws. Special meetings of the board of directors shall be held upon such notice as is provided in the bylaws, or in the absence of any such provision, upon notice sent by any usual means of communication not less than five days before the meeting. Attendance of a director at a meeting shall constitute a waiver of notice of such meeting, except where a director attends a meeting for the express purpose of objecting to the transaction of any business because the meeting is not lawfully called or convened. Neither the business to be transacted at, nor the purpose of, any regular or special meeting of the board of directors need be specified in the notice or waiver of notice of such meeting unless required by the bylaws. Notice of an adjourned meeting need not be given if the time and place are fixed at the meeting adjourning and if the period of adjournment does not exceed 10 days in any one adjournment.

(d) A majority of the number of directors fixed by the charter or bylaws shall constitute a quorum for the transaction of business unless a greater number is required by the charter or a bylaw adopted by the shareholders. The act of the majority of the directors present at a meeting at which a quorum is present shall be the act of the board of directors, unless the act of a greater number is required by this Chapter, the charter or a bylaw adopted by the shareholders. (1955, c. 1371, s. 1; 1969, c. 751, s. 12; 1973, c. 469, s. 8.)

Legal Periodicals. — For note on creation of shareholder agreements, see 1 unanimous approval of corporate bylaws and Campbell L. Rev. 153 (1979).

CASE NOTES

Applied in *Blount v. Taft*, 29 N.C. App. 626, 225 S.E.2d 583 (1976).
Cited in *S & W Realty & Bonded Com.* Agency v. *Duckworth & Shelton, Inc.*, 274 N.C. 243, 162 S.E.2d 486 (1968); *Blount v. Taft*, 295 N.C. 472, 246 S.E.2d 763 (1978).

§ 55-29. Informal or irregular action by directors or committees; attendance by telephone.

(a) Action taken by the required majority of the directors or members of a committee without a meeting is nevertheless board or committee action if:

- (1) Written consent to the action in question is signed by all the directors or members of the committee, as the case may be, and filed with the minutes of the proceedings of the board or committee, whether done before or after the action so taken, or if
- (2) All the shareholders know of the action in question and make no prompt objection thereto, or if
- (3) The directors or committee members are accustomed to take informal action and this custom is generally known to the shareholders and if all the directors or committee members, as the case may be, know of the action in question and no director or committee member makes prompt objection thereto.

(b) If a meeting of directors otherwise valid is held without proper call or notice, action taken at such meeting otherwise valid is deemed ratified by a director who did not attend unless promptly after having knowledge of the action taken and of the impropriety in question he files with the secretary or assistant secretary of the corporation his written objection to the holding of the meeting or to any specific action so taken.

(c) Unless otherwise provided in the charter or bylaws, any one or more directors or members of a committee may participate in a meeting of the board or committee by means of a conference telephone or similar communications device which allows all persons participating in the meeting to hear each other, and such participation in a meeting shall be deemed presence in person at such meeting. (1955, c. 1371, s. 1; 1959, c. 1316, s. 8; 1973, c. 469, ss. 9, 10.)

Legal Periodicals. — For article discussing this section, see 34 N.C.L. Rev. 432 (1956).
 For note on close corporations and personal liability from execution of shareholder agreements, see 16 Wake Forest L. Rev. 975 (1980).

§ 55-30. Director's adverse interest.

(a) A corporation may, by action of its board of directors or otherwise, compensate its directors for their services as directors, salaried officers or otherwise.

(b) No corporate transaction in which a director has an adverse interest is either void or voidable, if:

- (1) With knowledge on the part of the other directors of such adverse interest, the transaction is approved in good faith by a majority, not less than two, of the disinterested directors present even though less than a quorum, irrespective of the participation of the adversely interested director in the approval, or if
- (2) After full disclosure of all the material facts to all the shareholders, the transaction is specifically approved by the vote of a majority or by the written consent of all of the voting shares other than those owned or controlled by the adversely interested directors, or if

- (3) The adversely interested party proves that the transaction was just and reasonable to the corporation at the time when entered into or approved. In the case of compensation paid or voted for services of a director as director or as officer or employee the standard of what is "just and reasonable" is what would be paid for such services at arm's length under competitive conditions. (1955, c. 1371, s. 1.)

Legal Periodicals. — For comment on promoters of corporations dealing in condominiums, see 12 Wake Forest L. Rev. 979 (1976).

CASE NOTES

"Corporate Transaction" Construed. — The words "corporate transaction" were intended to apply to a situation where the corporate director is dealing directly with the corporation. *Smith v. Robinson*, 343 F.2d 793 (4th Cir. 1965).

Corporate officer acts in a fiduciary capacity and cannot profit at the expense of the corporation. *Smith v. Robinson*, 343 F.2d 793 (4th Cir. 1965).

Contracts Fixing Compensation Not Void or Voidable Per Se. — Notwithstanding the fiduciary relationship existing between officers and the corporation which they serve, contracts fixing the amount and method of paying compensation for services to be rendered are not void or voidable per se. *Fulton v. Talbert*, 255 N.C. 183, 120 S.E.2d 410 (1961).

Derivative Action against Director Does Not Necessarily Make Him "Adversely Interested." — In a derivative action brought by shareholders against directors of a corporation alleging malfeasance in office, this section did not operate to prevent § 55-19(d) from

being effective in allowing the corporation to advance any legal fees to the directors, since the advancement of legal fees under § 55-19(d) is not necessarily a transaction in which a director is adversely interested, and since, even if it were, the disinterested directors of the corporation had approved the advancement. *Swenson v. Thibaut*, 39 N.C. App. 77, 250 S.E.2d 279 (1978), cert. denied and appeal dismissed, 296 N.C. 740, 254 S.E.2d 181, 182, 183 (1979).

Adversely Interested Party Must Prove Transaction Was Fair. — While it is true that the North Carolina law and the general law do not prohibit corporate officers from dealing with the corporation, the adversely interested party must prove that the transaction was fair, just and reasonable when entered into. *Smith v. Robinson*, 343 F.2d 793 (4th Cir. 1965).

Applied in *S & W Realty & Bonded Com. Agency v. Duckworth & Shelton, Inc.*, 274 N.C. 243, 162 S.E.2d 486 (1968).

Cited in *Lowder v. All Star Mills, Inc.*, 301 N.C. 561, 273 S.E.2d 247 (1981).

§ 55-31. Executive and other committees.

(a) Unless otherwise provided in the charter or a bylaw adopted by the shareholders, the board of directors, by resolution adopted by a majority of the number of directors then in office may designate from among its members an executive committee and one or more other committees, each consisting of two or more directors, and each of which, to the extent provided in the resolution or in the charter or the bylaws of the corporation, shall have and may exercise all of the authority of the board of directors, except that no such committee shall have authority as to the following matters:

- (1) The dissolution, merger or consolidation of the corporation; or the sale, lease or exchange of all or substantially all of the property of the corporation.
- (2) The designation of any such committee or the filling of vacancies in the board of directors or in any such committee.
- (3) The fixing of compensation of the directors for serving on the board or on any such committee.
- (4) The amendment or repeal of the bylaws, or the adoption of new bylaws.
- (5) The amendment or repeal of any resolution of the board which by its terms shall not be so amendable or repealable.

(b) Any such committee, or any member thereof may be discharged or removed by action of a majority of the board of directors pursuant to the provisions of G.S. 55-28(d) or 55-29.

(c) The designation of any such committee and the delegation thereto of authority shall not operate to relieve the board of directors, or any member thereof, of any responsibility or liability imposed on him by law; and any resolutions adopted or other action taken by any such committee within the scope of the authority delegated to it by the board of directors shall be deemed for all purposes to be adopted or taken by the board of directors. (1955, c. 1371, s. 1; 1969, c. 751, s. 13; 1973, c. 1087, ss. 1, 2.)

CASE NOTES

Cited in *S & W Realty & Bounded Com.* 243, 162 S.E.2d 486 (1968); *Blount v. Taft*, 295 Agency v. Duckworth & Shelton, Inc., 274 N.C. N.C. 472, 246 S.E.2d 763 (1978).

§ 55-32. Liability of directors in certain cases.

(a) The liabilities imposed by this section are in addition to any other liabilities imposed by law upon directors of a corporation.

(b) Directors of a corporation who vote for or assent to the declaration of any dividend or other distribution of the assets of a corporation to its shareholders contrary to the provisions of this Chapter or contrary to any lawful restrictions contained in the charter shall be jointly and severally liable to the corporation for the amount of such dividend which is paid or the value of such assets which are distributed in excess of the amount which could have been lawfully paid or distributed.

(c) Directors of a corporation who vote for or assent to the purchase or redemption of its own shares contrary to the provisions of this Chapter shall be jointly and severally liable to the corporation for the amount of consideration paid for such shares which is in excess of the maximum amount which could have been lawfully paid.

(d) The liability of directors for violation of subsections (b) and (c) of this section shall not exceed the debts, obligations and liabilities existing at the time of the violation which are not thereafter paid and discharged, plus any loss sustained from the violation by holders of shares outstanding at the time of the violation other than the shares receiving the payment in question.

(e) The directors of a corporation who vote for or assent to any distribution of assets of a corporation to its shareholders during the liquidation of the corporation without the payment and discharge of, or making adequate provision for, all known or reasonably ascertainable debts, obligations, and liabilities of the corporation shall be jointly and severally liable to the corporation for the value of such assets which are distributed, to the extent that such debts, obligations and liabilities of the corporation are not thereafter paid and discharged.

(f) The directors of a corporation who vote for or assent to the making of any loan or guaranty or other form of security in violation of G.S. 55-22 shall be jointly and severally liable to the corporation for the repayment or return of the money or value loaned, with interest thereon at the rate of six percent (6%) a year until paid, or for any liability of the corporation upon the guaranty.

(g) If a corporation shall commence business before it has received the minimum amount of consideration for the issuance of shares, as stated in the articles of incorporation, the directors who assent thereto shall be jointly and severally liable to the corporation for such part of said minimum as shall not have been received before commencing business, but such liability shall be

terminated when the corporation has actually received the said minimum consideration.

(h) A director of a corporation who is present at a meeting of its board of directors at which action on any corporate matter is taken shall be presumed to have assented to the action taken unless his contrary vote is recorded or his dissent is otherwise entered in the minutes of the meeting or unless he shall file his written dissent to such action with the person acting as the secretary of the meeting before the adjournment thereof or shall forward such dissent by registered mail to the secretary of the corporation immediately after the adjournment of the meeting. Such right to dissent shall not apply to a director who voted in favor of such action. If action taken by an executive committee is not thereafter formally considered by the board, a director may dissent from such action by filing his written objection with the secretary of the corporation with reasonable promptness after learning of such action.

(i) A director shall not be liable under subsections (b), (c) or (e) of this section if he relied and acted in good faith and reasonably upon financial statements of the corporation represented to him to be correct and to be based upon generally accepted principles of sound accounting practice by the president or the officer of such corporation having charge of its books of account, or certified by an independent public accountant or by a certified public accountant or firm of such accountants to fairly reflect the financial condition of such corporation.

(j) Any director who is held liable upon and pays a claim asserted against him under or pursuant to this section for the payment of a dividend or other distribution of assets of a corporation shall be entitled to reimbursement or exoneration from the shareholders who accepted or received any such dividend or assets, knowing such dividend or distribution to have been made in violation of this section, in proportion to the amounts received.

(k) Any director against whom a claim shall be asserted under or pursuant to this section shall be entitled to contribution from the other directors who voted for or assented to the action upon which the claim is asserted and in any action against him shall, on motion, be entitled to have such directors made parties defendant.

(l) Except where the properties of a corporation are being administered in liquidation, or under court supervision for the benefit of creditors, or in the event that the official administering such properties refuses to bring an action for violation of this section, any creditor damaged by a violation of this section may in one action obtain judgment against the corporation and enforce the liability of one or more of the directors to the corporation imposed by this section to the extent necessary to satisfy his claim, or he may in a separate action obtain such judgment and then enforce such liability.

(m) No action shall be brought against the directors for liability under this section after three years from the time when the cause of action was discovered or ought to have been discovered. (Code, s. 681; 1901, c. 2, ss. 33, 52; Rev., s. 1192; C.S., s. 1179; 1927, c. 121; 1933, c. 354, s. 1; G.S., s. 55-116; 1955, c. 1371, s. 1; 1959, c. 1316, s. 35.)

CASE NOTES

Editor's Note. — Many of the cases cited below were decided under former statutory provisions.

Primary Right to Enforce Liabilities Lies in Corporation. — North Carolina statutory law has not changed, but rather has codified the rule that the primary right of enforcement of liabilities to the corporation lies in the corpora-

tion, and as such the corporation is the real party in interest and a necessary party to such action. *Underwood v. Stafford*, 270 N.C. 700, 155 S.E.2d 211 (1967).

Creditor or Stockholder Cannot Maintain Action without First Demanding Suit by Corporation. — Where the alleged breach or injuries are based on duties owed to the cor-

poration and not to any particular creditor or stockholder, the creditor or stockholder cannot maintain the action without a demand on the corporation, or its receiver if insolvent, to bring the suit and a refusal to do so, and a joinder of the corporation as a party. *Underwood v. Stafford*, 270 N.C. 700, 155 S.E.2d 211 (1967).

Liability of Director for Improper Dividend. — A director of a corporation who has not brought himself within the exemptions to liability for the payment of dividends to the stockholders when the profits of the business did not justify it, or its debts exceeded two thirds of its assets, etc., is liable, in the action of the trustee in bankruptcy of such corporation, for the amount of such debts, and the proper court costs and charges, not exceeding the amount of the dividends unlawfully declared. *Claypoole v. McIntosh*, 182 N.C. 109, 108 S.E. 433 (1921).

Effect of Charter Provision Exempting Stockholders from Liability. — A charter provision, that "no stockholder of the corporation shall be individually liable for debt, liability, contract, tort, omission; or engagement of the corporation or any other stockholder therein," does not interfere with the just and equitable principle embodied in the statute holding stockholders who are directors liable for a joint tort or misfeasance committed by them to the prejudice of creditors. *McIver v. Young Hdwe. Co.*, 144 N.C. 478, 57 S.E. 169 (1907).

Cited in *J.G.Dudley Co. v. Commissioner*, 298 F.2d 750 (4th Cir. 1962); *Blount v. Taft*, 295 N.C. 472, 246 S.E.2d 763 (1978); *Keels v. Turner*, 45 N.C. App. 213, 262 S.E.2d 845 (1980).

§ 55-33. Jurisdiction over and service on nonresident director.

(a) Every nonresident of this State who shall become a director of a domestic corporation shall by becoming such director be subjected to the jurisdiction of the courts of this State in all actions or proceedings brought therein by, or on behalf of, or against said corporation in which said director is a necessary or proper party, or in any action or proceeding by shareholders or creditors against said director for violation of his duty as director. Every nonresident who is a director of a domestic corporation when this Chapter becomes effective shall be likewise so subject to the jurisdiction of the courts of this State unless he shall within 60 days of the effective date of this Chapter resign his office and file in the office of the Secretary of State a notice of such resignation.

(b) Every nonresident by serving as a director of a domestic corporation at any time after 60 days from the effective date of this Chapter shall be subject to the jurisdiction of the courts of this State in any action or proceeding for violation of his duty while in office.

(c) Every resident of this State who shall become a director of a domestic corporation and thereafter removes his residence from this State shall be subject to the jurisdiction of the courts of this State in all actions or proceedings brought therein by, or on behalf of, or against said corporation in which said director is a necessary or proper party, or in any action or proceeding by shareholders or creditors against said director for violation of his duty as a director.

(d) In all actions or proceedings wherein a director or former director is made a party, and cannot with due diligence be found within the State, service of process, notice or demand on said director or former director shall be made by mailing or otherwise delivering duplicate copies thereof to the Secretary of State, who shall be deemed to have been constituted the process agent of such director or former director by the act of such director in becoming a director or continuing as director for the period provided in subsection (a) of this section. When such copies are to be delivered to the Secretary of State the procedure to be followed shall be, as against such director or former director, substantially the same as that set forth in G.S. 55-146 relating to service on foreign corporations by serving the Secretary of State, and service made pursuant to such procedure shall have the same legal force and validity as if the service had been made personally in this State. (1955, c. 1371, s. 1.)

Legal Periodicals. — For article surveying 1978 law on civil procedure, see 57 N.C.L. Rev. 891 (1979).

CASE NOTES

Due Process Requirements. — For an analysis of the due process requirements for jurisdiction over nonresident directors of domestic corporations in shareholders' derivative actions, see *Swenson v. Thibaut*, 39 N.C. App. 77, 250 S.E.2d 279 (1978), cert. denied and appeal dismissed, 296 N.C. 740, 254 S.E.2d 181, 182, 183 (1979).

Legislative Intent. — The legislature, by way of § 1-75.4(8) and this section, has expressed a substantial interest in bringing nonresident directors of corporations before the North Carolina courts, and has given to the courts the fullest jurisdiction allowable under the Constitution. *Swenson v. Thibaut*, 39 N.C. App. 77, 250 S.E.2d 279 (1978), cert. denied and appeal dismissed, 296 N.C. 740, 254 S.E.2d 181, 182, 183 (1979).

Interpretation and Validity of Section Depend on Facts. — Questions as to the interpretation and validity of this section must be considered in relation to specific factual situations. *Lane Trucking Co. v. Haponski*, 260 N.C. 514, 133 S.E.2d 192 (1963).

Consideration of Validity of Section Unnecessary. — Where sufficient contacts existed between North Carolina and a nonresident director of a North Carolina corporation at the time of the events complained of in a shareholders' derivative action alleging malfeasance in office by the director to subject him constitutionally to the jurisdiction of the North

Carolina courts, it was not necessary that the Court of Appeals consider the validity of this section per se. *Swenson v. Thibaut*, 39 N.C. App. 77, 250 S.E.2d 279 (1978), cert. denied and appeal dismissed, 296 N.C. 740, 254 S.E.2d 181, 182, 183 (1979).

Subsection (c) Refers to Actions against Director as Such. — Subsection (c) refers to (1) actions in which a former resident of this State who was and is a director of a domestic corporation is a necessary or proper party in his capacity as such director; and (2) actions by shareholders or creditors against a director for violation of his duty as such director. *Lane Trucking Co. v. Haponski*, 260 N.C. 514, 133 S.E.2d 192 (1963).

It Is Inapplicable to Action against One Not Director or for Actions after Removal. — Subsection (c) has no application to an action against a person who is not a director of a corporation at the time the action is instituted, or to an action which seeks recovery against a director for alleged wrongful conduct subsequent to his removal from office as director. *Lane Trucking Co. v. Haponski*, 260 N.C. 514, 133 S.E.2d 192 (1963).

When It Applies, Subsection (d) Provides Method of Service. — When subsection (c) is applicable, subsection (d) provides the exclusive method of service of process. *Lane Trucking Co. v. Haponski*, 260 N.C. 514, 133 S.E.2d 192 (1963).

§ 55-34. Officers.

(a) Every corporation organized under this Chapter shall have such officers with such titles and duties as shall be stated in the bylaws and as may be necessary to enable it to sign instruments and stock certificates and to conduct its business in compliance with this Chapter. Any number of offices may be held by the same person and any one office may be held collectively by one or more persons unless the articles of incorporation or bylaws otherwise provide, but no officer may act in more than one capacity where action of two or more officers is required. Whenever a specific office is referred to in this Chapter, it shall be deemed to include any person who, individually or collectively with one or more other persons, holds or occupies such office.

(b) All officers and agents of the corporation, as between themselves and the corporation, shall have such authority and perform such duties in the management of the corporation as may be provided either specifically or generally in the bylaws, or as may be determined by action of the board of directors not inconsistent with the bylaws.

(c) The president has authority to institute or defend legal proceedings when the directors are deadlocked.

(d) Any officer or agent elected or appointed by the board of directors may be removed by the board of directors whenever in its judgment the best interests of the corporation will be served thereby, but such removal shall be without prejudice to the contract rights, if any, of the person so removed. (1901, c. 2, ss. 15, 16, 17; Rev., ss. 1149, 1150, 1151; C.S., s. 1145; G.S., s. 55-49; 1955, c. 1371, s. 1; 1959, c. 1316, s. 9; 1973, c. 1217.)

CASE NOTES

Editor's Note. — Many of the cases below were decided under former law.

Conduct of Day-to-Day Business. — The day-to-day business of a corporation is actually conducted by its officers, employees and other agents under the authority and control of its board of directors. Under this section, the officers of a corporation have such authority and may perform such duties in the management of the corporation as provided either specifically or generally in the bylaws, or as may be determined by action of the board of directors not inconsistent with the bylaws. *Burlington Indus., Inc. v. Foil*, 284 N.C. 740, 202 S.E.2d 591 (1974).

President Is Head and General Agent of Corporation. — The president of a corporation by the very nature of his position is the head and general agent of the corporation, and accordingly he may act for the corporation, in the business in which the corporation is engaged. *Burlington Indus., Inc. v. Foil*, 284 N.C. 740, 202 S.E.2d 591 (1974).

But the authority of the president to act for the corporation is limited to those matters that are incidental to the business in which the corporation is engaged, that is, to matters that are within the corporation's ordinary course of business. *Burlington Indus., Inc. v. Foil*, 284 N.C. 740, 202 S.E.2d 591 (1974).

Necessity for Contract for Compensation. — An officer of a corporation, for services in the course and scope of his official duties, can only recover when compensation therefor has been authoritatively agreed upon in advance. It is not always required that a definite sum be fixed upon, but there must be a previous agreement for compensation existent or in some way expressed so as to bind the company. There can be no recovery on a quantum meruit. *Chiles v. United States Furn. Mfg. Co.*, 167 N.C. 574, 83 S.E. 812 (1914). See *Caho v. Norfolk & S. Ry.*, 147 N.C. 20, 60 S.E. 640 (1908).

Individual Liability of Officers. — Where

officers of a corporation knowingly participate in a wrong which is actionable they are jointly and severally liable therefor. *Cone v. United Fruit Growers' Ass'n*, 171 N.C. 530, 83 S.E. 860 (1916).

Defense Based on Unwritten Limitation on Powers. — The president of a corporation is not bound by any secret limitation upon the authority usually vested in the chief officer of a corporation; hence a defense to a note, issued by the president of a corporation, that it was unauthorized because of an unwritten bylaw, is untenable. *Phillips v. Interstate Land Co.*, 176 N.C. 514, 97 S.E. 417 (1918).

The president of a corporation under former § 55-49 had implied power to sign a note, and secret limitations on his authority were not binding on the payee. *White v. Johnson & Sons*, 205 N.C. 773, 172 S.E. 370 (1934).

The secretary of an incorporated garage and automobile repair company has the implied authority to settle claims made for damages upon the corporation, and one so dealing with him therein will not be bound by a secret limitation of his authority; and upon his own testimony that he was the proper one to be dealt with in this respect, the question of the corporation's liability for his promise to pay the claim is properly presented. *Beck v. Wilkins-Ricks Co.*, 186 N.C. 210, 119 S.E. 235 (1923).

The general manager of one of a chain of stores has implied authority to employ clerks by the year, and the corporation is bound by such contract though there exists an undisclosed limitation of the agent's authority to make contracts of employment for more than a month. *Strickland v. S.H. Kress & Co.*, 183 N.C. 534, 112 S.E. 30 (1922).

Removal. — The officers of a corporation created for private purposes have no franchise in their offices, and are removable during the term for which they are appointed, when found to be incompetent or faithless. *Eliason v. Coleman*, 86 N.C. 236 (1882).

§ 55-35. Duty of directors and officers to corporation.

Officers and directors shall be deemed to stand in a fiduciary relation to the corporation and to its shareholders and shall discharge the duties of their respective positions in good faith, and with that diligence and care which ordinarily prudent men would exercise under similar circumstances in like positions. (1955, c. 1371, s. 1.)

Legal Periodicals. — For note on the liability of directors and officers for negligent management, see 45 N.C.L. Rev. 748 (1967).

For note on the fiduciary duty of interested directors and the business judgment rule, see 45 N.C.L. Rev. 755 (1967).

For comment on promoters of corporations

dealing in condominiums, see 12 Wake Forest L. Rev. 979 (1976).

For note on close corporations and personal liability from execution of shareholder agreements, see 16 Wake Forest L. Rev. 975 (1980).

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Section is declaratory of the law prior to the Business Corporation Act. *Fulton v. Talbert*, 255 N.C. 183, 120 S.E.2d 410 (1961).

Directors owe the corporation fidelity and the duty to use due care in the management of its business. *Wilson v. McClenney*, 262 N.C. 121, 136 S.E.2d 569 (1964).

Director in Fiduciary Relationship to Shareholder. — Under special circumstances, a director of a corporation stands in a fiduciary relationship to a shareholder or director in the acquisition of the shareholder's stock. *Lazenby v. Godwin*, 40 N.C. App. 487, 253 S.E.2d 489 (1979).

Officers Must Act in Good Faith. — The officers of a company have no right to take advantage of their knowledge of its financial condition to secure a preference for themselves on all its property as to a preexisting debt. *Hill v. Pioneer Lumber Co.*, 113 N.C. 173, 18 S.E. 107 (1893); *Thomson-Houston Elec. Light Co. v. Henderson Elec. Light Co.*, 116 N.C. 112, 21 S.E. 951 (1895); *Graham v. Carr*, 130 N.C. 271, 41 S.E. 379 (1902); *Holshouser v. Copper Co.*, 138 N.C. 248, 50 S.E. 650 (1905); *Edwards v. Hill Supply Co.*, 150 N.C. 171, 63 S.E. 742 (1909).

Corporate officer cannot for himself take business from the corporation. *Brite v. Penny*, 157 N.C. 110, 72 S.E. 964 (1911).

Contracts Fixing Compensation Not Void or Voidable Per Se. — Notwithstanding the fiduciary relationship existing between officers and the corporation which they serve, contracts fixing the amount and method of paying compensation for services to be rendered are not void or voidable per se. *Fulton v. Talbert*, 255 N.C. 183, 120 S.E.2d 410 (1961).

Suit for Breach of Duty Is Derivative. — A

suit against the corporation's officers and directors for breach of their fiduciary duty on account of mismanagement is clearly derivative. *Gilbert v. Bagley*, 492 F. Supp. 714 (M.D.N.C. 1980).

When Action by Shareholders Is Individual. — Where several officers and directors were alleged to have breached the fiduciary duty owed to shareholders by maintaining the market price of the corporation's shares at artificial levels and in issuing false or misleading financial statements, the shareholder plaintiffs would be entitled to receive any recovery under these allegations and the action was thus individual. *Gilbert v. Bagley*, 492 F. Supp. 714 (M.D.N.C. 1980).

Shareholder plaintiffs need not demonstrate that all defendants are amenable to suit under this section. Rather, nonofficers and nondirectors may, by North Carolina common-law principles, be held to answer for substantially assisting or encouraging another's breach of fiduciary duty. *Gilbert v. Bagley*, 492 F. Supp. 714 (M.D.N.C. 1980).

Action Based on Fraud for Salaries Not Honestly Earned. — The right of action which accrues for the fixing and taking by one in authority of salaries, bonuses, or other moneys not honestly earned and fairly owing is based on fraud. When one seeks to recover for wrongs fraudulently inflicted, he must allege the facts which, if proven, will establish the fraud. It is not sufficient merely to allege as a conclusion that the payments were "exorbitant, unreasonable, and unjust." *Fulton v. Talbert*, 255 N.C. 183, 120 S.E.2d 410 (1961).

Cited in *Smith v. Ford Motor Co.*, 289 N.C. 71, 221 S.E.2d 282 (1976); *Stone v. McClam*, 42 N.C. App. 393, 257 S.E.2d 78 (1979).

§ 55-36. Execution of corporate instruments; authority and proof.

(a) Notwithstanding anything to the contrary in the bylaws or charter, any deed, mortgage, contract, note, evidence of indebtedness, proxy, or other instrument in writing, or any assignment or indorsement thereof, whether heretofore or hereafter executed, when signed in the ordinary course of business on behalf of a corporation by its president, a vice-president or an assistant vice-president and attested or countersigned by its secretary or an assistant secretary, (or, in the case of a bank, attested or countersigned by its secretary, assistant secretary, cashier, or assistant cashier), not acting in dual capacity, shall with respect to the rights of innocent third parties, be as valid as if executed pursuant to authorization from the board of directors, unless the instrument reveals on its face a potential breach of fiduciary obligation. The foregoing shall not apply to parties who had actual knowledge of lack of authority or of a breach of fiduciary obligation or to the execution of corporate securities which are required, by corporate regulations or resolutions formally adopted, to be signed or countersigned by a transfer agent or registrar who has agreed to act in that capacity.

(b) Any instrument purporting to create a security interest in personal property of a corporation, is sufficiently executed on behalf of the corporation if heretofore or hereafter signed in his official capacity by the president, a vice-president, an assistant vice-president, the secretary, an assistant secretary, the treasurer, or an assistant treasurer. Any instrument so executed shall, with respect to the rights of innocent holders, be as valid as if authorized by the board of directors and upon acknowledgment may be ordered to registration as provided by law.

(c) Deeds, mortgages, contracts, notes, evidences of indebtedness and other instruments purporting to be executed, heretofore or hereafter, by a corporation, foreign or domestic, and bearing a seal which purports to be the corporate seal, setting forth the name of the corporation engraved, lithographed, printed, stamped, impressed upon, or otherwise affixed to the instrument, are prima facie evidence that the seal is the duly adopted corporate seal of the corporation, that it has been affixed as such by a person duly authorized so to do, that such instrument was duly executed and signed by persons who were officers or agents of the corporation acting by authority duly given by the board of directors, that any such instrument is the act of the corporation, and shall be admissible in evidence without further proof of execution.

(d) The provisions of the foregoing subsections of this section shall apply to all instruments therein mentioned executed on behalf of foreign corporations when their authorization, admissibility in evidence or legal effect is challenged in any action or other proceeding in this State.

(e) Nothing in this section shall be deemed to exclude the power of any corporate representatives to bind the corporation pursuant to express, implied or apparent authority, ratification, estoppel or otherwise.

(f) Nothing in this section shall relieve corporate officers from liability to the corporation or from any other liability that they may have incurred from any violation of their actual authority.

(g) The Home Owners Loan Corporation or any corporation, the majority of whose stock is owned by the United States government, may convey lands or other property which is transferable by deed which is duly executed by either an officer, manager, or agent of said corporation, sealed with the common seal and has attached thereto a signed and attested resolution, under seal, of the board of directors of said corporation authorizing the said officer, manager or agent to execute, sign, seal, and attest deeds, conveyances or other instruments. This section shall be deemed to have been complied with if an attested

resolution is recorded separately in the office of the register of deeds in the county where the land lies, which said resolution shall be applicable to all deeds executed subsequently thereto and pursuant to its authority. All deeds, conveyances or other instruments which have been heretofore or shall be hereafter so executed shall, if otherwise sufficient, be valid and shall have the effect to pass the title to the real or personal property described therein. (1909, c. 335, s. 1; C.S., s. 1139; 1941, c. 294; 1949, c. 1224, s. 2; G.S., ss. 55-42, 55-43; 1951, cc. 66, 395; 1955, c. 1371, s. 1; 1979, c. 359, ss. 1, 2.)

CASE NOTES

Purpose. — This section protects innocent parties from later assertions by corporations that their contracts were not authorized by the corporation's board of directors. *George E. Shepard, Jr., Inc. v. Kim, Inc.*, 52 N.C. App. 700, 279 S.E.2d 858, cert. denied, 304 N.C. 392, 285 S.E.2d 831 (1981).

Section Remedial. — Subsection (e) of this section clearly shows the section's remedial nature. *George E. Shepard, Jr., Inc. v. Kim, Inc.*, 52 N.C. App. 700, 279 S.E.2d 858, cert. denied, 304 N.C. 392, 285 S.E.2d 831 (1981).

Ordinary Rules of Agency Suspended. — In contracts between corporations and innocent third parties, this section suspends the ordinary agency rules requiring proof of authority. *George E. Shepard, Jr., Inc. v. Kim, Inc.*, 52 N.C. App. 700, 279 S.E.2d 858, cert. denied, 304 N.C. 392, 285 S.E.2d 831 (1981).

Authority of Agent Must Be Ascertained. — A party relying upon the authority of an agent to act for his principal under subsection (e) must ascertain the extent of such agent's authority. *Nationwide Homes of Raleigh, N.C.*

Inc. v. First-Citizens Bank & Trust Co., 262 N.C. 79, 136 S.E.2d 202 (1964).

But Principal Is Liable for Agent's Acts within Apparent Scope of Authority. — A principal is liable not only for acts expressly authorized but also for acts within the apparent scope of the authority with which the principal has clothed the agent. *Nationwide Homes of Raleigh, N.C., Inc. v. First-Citizens Bank & Trust Co.*, 262 N.C. 79, 136 S.E.2d 202 (1964).

Instrument Not Attested by Secretary. — Nothing else appearing, it is clear that an instrument fails when it is not attested by the corporate secretary. *J. Perry Jones Realty, Inc. v. McLamb*, 21 N.C. App. 482, 204 S.E.2d 880 (1974).

Typed name of the corporation on a financing statement was insufficient under subsection (b). *Little v. County of Orange*, 31 N.C. App. 495, 229 S.E.2d 823 (1976).

Quoted in *Krechel v. Mercer*, 262 N.C. 243, 136 S.E.2d 608 (1964).

Cited in *Wall v. Colvard, Inc.*, 268 N.C. 43, 149 S.E.2d 559 (1966).

§ 55-36.1. Declaring certain corporate conveyances prior to January 1, 1969, valid.

Any deed, deed of trust, or other conveyance for land in this State made on behalf of a corporation prior to January 1, 1969, where the president or vice-president has appeared before a notary public and the secretary or assistant secretary has attested and placed the corporate seal of such corporation upon the instrument and the instrument was executed by the president or vice-president on behalf of such corporation by its authority duly given and said certificate recites that the secretary or assistant secretary acknowledges the instrument to be the act and deed of the corporation, in the absence of an acknowledgment of the president or vice-president, the instrument and acknowledgment being otherwise regular, is hereby declared to be a good and valid deed or conveyance by such corporation for all purposes, and shall be admitted to probate and registration, and shall pass title to the property therein conveyed to the grantee as fully as if said deed, deed of trust, or other conveyance were executed according to the provisions and forms of law in force in this State at the date of the execution of said deed, deed of trust or other conveyance. (1969, c. 953, s. 1.)

§ 55-37. Books and records.

(a) Each corporation shall:

- (1) Keep correct and complete books and records of account, and
- (2) Keep minutes of the proceedings of its shareholders, its board of directors, and executive committee, if any,
- (3) Keep in this State at its registered office or principal place of business or at the office of its transfer agent or registrar a record of its shareholders, giving the names and addresses of all shareholders and the number and class of the shares held by each, and
- (4) Cause a true statement of its assets and liabilities as of the close of each fiscal year and of the results of its operations and of changes in surplus for such fiscal year, all in reasonable detail, including the statement required by G.S. 55-44(b) when applicable, to be made and filed at its registered office or principal place of business in this State, within four months after the end of such fiscal year, and thereat kept available for a period of at least 10 years for inspection on request by any shareholder of record, and shall mail or otherwise deliver a copy of the latest such statement to any shareholder upon his written request therefor.

(b) Any shareholder may apply for a writ of mandamus to compel a corporation and its officers and directors to comply with this section. (1901, c. 2, ss. 38, 45; Rev., ss. 1180, 1181; C.S., s. 1170; G.S., s. 55-107; 1955, c. 1371, s. 1.)

Legal Periodicals. — For survey of 1979 commercial law, see 58 N.C.L. Rev. 1290 (1980).

CASE NOTES

Common-Law Right of Shareholder to Inspect Records. — At common law stockholders in private corporations have the right to make reasonable inspection of a corporation's books to assure themselves of efficient management. *White v. Smith*, 256 N.C. 218, 123 S.E.2d 628 (1962).

Right Was Not Abridged but Enlarged by Statute. — The explanatory comment accompanying the bill which became this Chapter makes it clear that the right of a shareholder to know his associates and the extent of their holdings was not abridged but enlarged. *White v. Smith*, 256 N.C. 218, 123 S.E.2d 628 (1962).

Right to Information is Unqualified. — This section contains no qualifying language. The language is absolute: the corporation "shall" mail or otherwise deliver the documents to "any" shareholder upon his written request therefor. The legislature has decided that the information referred to in this section is so basic and fundamental that any shareholder is entitled to a copy of it merely by writing for it. The motive of the requesting shareholder is irrelevant. *Morgan v. McLeod*, 40 N.C. App. 467, 253 S.E.2d 339, cert. denied, 297 N.C. 611, 257 S.E.2d 436 (1979).

Rights under This Section and § 55-38 Compared. — This section grants certain absolute rights to shareholders; § 55-38 grants

certain qualified rights to shareholders. *Morgan v. McLeod*, 40 N.C. App. 467, 253 S.E.2d 339, cert. denied, 297 N.C. 611, 257 S.E.2d 436 (1979).

"Proper Purpose" Language of § 55-38 Is Inapplicable. — The qualifying language of § 55-38, i.e., that the requested information be for a "proper purpose," is not applicable to this section. *Morgan v. McLeod*, 40 N.C. App. 467, 253 S.E.2d 339, cert. denied, 297 N.C. 611, 257 S.E.2d 436 (1979).

Subsection (a)(3) of this section is supplemented by § 55-64. *White v. Smith*, 256 N.C. 218, 123 S.E.2d 628 (1962).

Separate Books Not Required for Stockholders and Government. — It is not logical to conclude that the legislature, in adopting this Chapter, intended to require a corporation to keep two sets of books, one for its stockholders, and the other for the government, if it wished to compute its taxes on a cash receipt basis. *Watson v. Watson Seed Farms, Inc.*, 253 N.C. 238, 116 S.E.2d 716 (1961).

Effect of Chapter on Accepted Methods of Accounting. — Where a corporation has kept its books for a number of years according to an accepted method of accounting, which system is sufficient in computing its capital and surplus for franchise tax purposes and its income for income tax on a cash receipt basis,

this Chapter does not make mandatory the abandonment of such system or adoption of a new system of accounting by the corporation. *Watson v. Watson Seed Farms, Inc.*, 253 N.C. 238, 116 S.E.2d 716 (1960).

Application to Building and Loan Associations. — Subsection (a)(3) of this section and § 55-64 apply to building and loan associations. *White v. Smith*, 256 N.C. 218, 123 S.E.2d 628 (1962).

The provisions of this section concerning shareholders' lists, and § 55-64, concerning voting lists, are applicable to savings and loan associations, and mandamus is expressly authorized by subsection (b) of this section to compel compliance. *Cooke v. Outland*, 265 N.C. 601, 144 S.E.2d 835 (1965).

When Proceedings May Be Proved by Parol Testimony. — When it is shown that no

minutes were made of a particular meeting, or that they are incomplete, the proceedings may be proved by parol testimony. *S & W Realty & Bonded Com. Agency v. Duckworth & Shelton, Inc.*, 274 N.C. 243, 162 S.E.2d 486 (1968).

Mandamus to Require Disclosure of Names, Addresses and Holdings of Shareholders. — Shareholders in a building and loan association were entitled to a writ of mandamus, requiring the association and its officers to provide them an opportunity to inspect the records of the association to ascertain the names, addresses, and number of shares held by each shareholder so that they might solicit proxies for use at shareholders' meetings. *White v. Smith*, 256 N.C. 218, 123 S.E.2d 628 (1962).

Stated in Stone v. Martin. — N.C. App. —, 289 S.E.2d 898 (1982).

§ 55-37.1. Form of records.

Any records maintained by a corporation in the regular course of its business, including its stock ledger, books of account, and minute books, may be kept on, or be in the form of, punch cards, magnetic tape, photographs, microphotographs, or any other information storage device; provided that the records so kept can be converted into clearly legible form within a reasonable time. Any corporation shall so convert any records so kept upon the request of any person entitled to inspect the same. Where records are kept in such manner, the cards, tapes, photographs, microphotographs or other information storage device together with a duly authenticated printout or translation shall be admissible in evidence, and shall be accepted for all other purposes, to the same extent as an original written record of the same information would have been. (1969, c. 751, s. 14.)

Legal Periodicals. — For article surveying 1973 case law on the admissibility of computer printouts, see 52 N.C.L. Rev. 903 (1974).

For article entitled, "Toward a Codification of the Law of Evidence in North Carolina," see 16 Wake Forest L. Rev. 669 (1980).

CASE NOTES

Purpose Is to Give Approval to Use in Evidence of Corporate Computer Records. — This section was designed to give broad legislative approval to the use in evidence of corporate computer records. However, in declaring such computer records admissible in evidence, it does not deal with the special problems of reliability created by the use of computers. *State v. Springer*, 283 N.C. 627, 197 S.E.2d 530 (1973).

And It Authorizes Their Admission under Safeguards. — This section authorizes the admission of corporate computer records under appropriate safeguards deemed sufficient to render them trustworthy. *State v. Springer*, 283 N.C. 627, 197 S.E.2d 530 (1973).

But Does Not Preclude Judicial Development of Standards for Admission. — This section does not, and was not designed

to, preclude judicial development of workable standards for the admission of computerized business records generally. *State v. Springer*, 283 N.C. 627, 197 S.E.2d 530 (1973).

Conditions under Which Printouts Are Admissible. — Printout cards or sheets of business records stored on electronic computing equipment are admissible in evidence, if otherwise relevant and material, if: (1) The computerized entries were made in the regular course of business, (2) the entries were made at or near the time of the transaction involved, and (3) a proper foundation for such evidence is laid by testimony of a witness who is familiar with the computerized records and the methods under which they were made so as to satisfy the court that the methods, the sources, of information, and the time of preparation render such evidence trustworthy. *State v. Springer*, 283

N.C. 627, 197 S.E.2d 530 (1973); State v. Stapleton, 29 N.C. App. 363, 224 S.E.2d 204, appeal dismissed, 290 N.C. 554, 226 S.E.2d 513 (1976).

Computer printout evidence may be refuted to the same extent as business records made in books of account. State v. Springer, 283 N.C. 627, 197 S.E.2d 530 (1973).

Failure to Lay Foundation for Admission. — Computer printout referred to

in oral testimony is inadmissible where no foundation is laid for its admission and the printout itself is not offered in evidence. State v. Springer, 283 N.C. 627, 197 S.E.2d 530 (1973).

Testimony as to contents of computer printout is inadmissible under the best-evidence rule. State v. Springer, 283 N.C. 627, 197 S.E.2d 530 (1973).

§ 55-38. Examination and production of books, records and information.

(a) For the purpose of this section, a qualified shareholder is a person, natural or corporate, who shall have been a shareholder of record in a corporation, domestic or foreign, for at least six months immediately preceding his demand or who shall be the holder of record of at least five percent (5%) of its outstanding shares of any class, and the term shareholder includes a holder of a voting trust certificate to the extent of the shares represented by said certificate; provided that the personal representative of the estate of a deceased holder, or the guardian, committee, trustee or conservator of the estate of a ward, incompetent or missing person who is a holder, or a trustee in bankruptcy of a holder, or a receiver or liquidator of the estate or affairs of a holder, shall be deemed to be a qualified shareholder regardless of the period of time he has been a shareholder of record or the number of shares held by him.

(b) A qualified shareholder, upon written demand stating the purpose thereof, shall have the right, in person, or by attorney, accountant or other agent, at any reasonable time or times, for any proper purpose, to examine at the place where they are kept and make extracts from, the books and records of account, minutes and record of shareholders of a domestic corporation or those of a foreign corporation actually or customarily kept by it within this State. A qualified shareholder in a parent corporation shall have the aforesaid rights with respect to the books, records and minutes of a domestic subsidiary corporation or those of a foreign subsidiary corporation actually or customarily kept by it within this State. A shareholder's rights under this subsection may be enforced by an action in the nature of mandamus.

(c) Two or more shareholders whose aggregate holdings equal the percentage of holdings required of a qualified shareholder may join in exercising their rights.

(d) Any officer or agent or corporation refusing to mail a statement as required by G.S. 55-37 or refusing to allow a qualified shareholder to examine and make extracts from the aforesaid books and records of account, minutes and record of shareholders, for any proper purpose, shall be liable to such shareholder in a penalty of ten percent (10%) of the value of the shares owned by such shareholder, but not to exceed five hundred dollars (\$500.00), in addition to any other damages or remedy afforded him by law, but the court may decrease the amount of such penalty on a finding of mitigating circumstances. It shall be a defense to any action for penalties under this section that the person suing therefor has at any time sold or offered for sale any list of shareholders of such corporation or any other corporation or has aided or abetted any person in procuring any list of shareholders for any such purpose, or has improperly used any information secured through any prior examination of the books and records of account, or minutes, or record of shareholders of such corporation or any other corporation.

(e) Any person, firm, or corporation who sells, offers for sale, or procures for the purpose of sale any list of shareholders of a corporation, or who uses

information obtained pursuant to the provisions of G.S. 55-38 for any purposes other than those incident to ownership of the shares as to which such information was obtained, shall be guilty of a misdemeanor and, upon conviction, shall be fined or imprisoned in the discretion of the court.

(f) Notwithstanding the foregoing provisions of this section, upon proof of proper purpose by a shareholder of a domestic or foreign corporation, irrespective of the period of time during which such shareholder shall have been a shareholder of record and irrespective of the number of shares held by him:

- (1) The superior court of the county wherein a domestic corporation has its registered office or its principal office may compel the production, for examination by such a shareholder, of the books, documents and records of the corporation, whether or not the same are usually kept within or without the State, and
- (2) The superior court of the county wherein a foreign corporation keeps any books, documents and records may compel the production, for examination by such a shareholder, of those books, documents and records that are customarily kept in this State by that corporation, even though they may not be within the State at that time.

(g) In any action or proceeding to which a domestic or foreign corporation is a party, any court of record in this State may, upon notice fixed by the court, and after hearing and proper cause shown, and upon such terms as prescribed by the court, order any or all of the pertinent books, documents and records of such corporation, or transcripts from or duly authenticated copies thereof, to be brought within this State, and kept therein at such place and for such time and for such purposes as may be designated in such order.

(h) Any corporation refusing to comply with any final order made by a court pursuant to subsections (f) and (g) of this section shall, if a domestic corporation, be subject to involuntary dissolution under G.S. 55-122 and, if a foreign corporation, shall be subject to revocation of its certificate of authority; and the offending directors and officers of such domestic or foreign corporation shall be subject to be punished for contempt of court for disobedience of such order.

(i) Provided that nothing in this section shall be construed to authorize a shareholder of a banking corporation to examine the deposit records or loan records of a bank customer, except upon order of a court of competent jurisdiction for good cause shown. (1901, c. 2, s. 49; Rev., s. 1179; C.S., s. 1172; G.S., s. 55-109; 1955, c. 1371, s. 1; 1965, c. 609; 1973, c. 469, s. 11.)

Legal Periodicals. — For note on the 1965 amendments to this Chapter, see 44 N.C.L. Rev. 1106 (1966).

For survey of 1979 commercial law, see 58 N.C.L. Rev. 1290 (1980).

CASE NOTES

Purpose of this section was to define with some definiteness the rights of inspection of shareholders and to impose some safeguards against fishing expeditions, especially by recent transferees. *Cooke v. Outland*, 265 N.C. 601, 144 S.E.2d 835 (1965).

Rights under This Section and § 55-37 Compared. — Section 55-37 grants certain absolute rights to shareholders; this section grants certain qualified rights to shareholders. *Morgan v. McLeod*, 40 N.C. App. 467, 253 S.E.2d 339, cert. denied, 297 N.C. 611, 257 S.E.2d 436 (1979).

Stockholders Have Right to Inspect Books. — Since the stockholders are, in a

sense, the beneficial owners of the corporate assets, and thus the persons primarily interested in seeing that the concern is efficiently and profitably managed, they are entitled to inspect the books and records in order to investigate the conduct of the management, determine the financial condition of the corporation, and generally take an account of the stewardship of the officers and directors, at least where there are circumstances justifying some suspicion of mismanagement. *Cooke v. Outland*, 265 N.C. 601, 144 S.E.2d 835 (1965).

But Fishing Expedition Is Not Authorized. — This section does not give a stockholder an absolute right of inspection and

examination for a mere fishing expedition, or for a purpose not germane to the protection of his economic interest as a shareholder in the corporation. *Cooke v. Outland*, 265 N.C. 601, 144 S.E.2d 835 (1965).

"Proper Purpose" Qualification Applies Only to This Section. — The "proper purpose" qualification is clearly limited to the information contemplated by this section. *Morgan v. McLeod*, 40 N.C. App. 467, 253 S.E.2d 339, cert. denied, 297 N.C. 611, 257 S.E.2d 436 (1979).

The qualifying language of this section, i.e., that the requested information be for a "proper purpose," is not applicable to § 55-37. *Morgan v. McLeod*, 40 N.C. App. 467, 253 S.E.2d 339, cert. denied, 297 N.C. 611, 257 S.E.2d 436 (1979).

"Proper" Motive Required for Actual Visit. — Under subsection (b) of this section the requesting shareholders must have a "proper purpose" in wanting the information. For a shareholder to have the right to actually visit a corporation's office and possibly disrupt its normal operation by inspecting voluminous books and records of account, the legislature has correctly decided that his motives must be "proper." *Morgan v. McLeod*, 40 N.C. App. 467, 253 S.E.2d 339, cert. denied, 297 N.C. 611, 257 S.E.2d 436 (1979).

Method for Determination of Value under Subsection (d). — This section is silent

as to a method of determining value under subsection (d) of this section. *Morgan v. McLeod*, 40 N.C. App. 467, 253 S.E.2d 339, cert. denied, 297 N.C. 611, 257 S.E.2d 436 (1979).

In determining value under subsection (d) of this section the trial court must consider all material factors and elements which counsel bring to the court and not depend upon any one particular formula exclusively. The weight accorded a theory or factor will vary with the circumstances. *Morgan v. McLeod*, 40 N.C. App. 467, 253 S.E.2d 339, cert. denied, 297 N.C. 611, 257 S.E.2d 436 (1979).

When Mandamus Proper. — The writ of mandamus should not be granted for speculative purposes, or to gratify idle curiosity, or to aid a blackmailer, but it may not be denied to the stockholder who seeks the information for legitimate purposes. *Cooke v. Outland*, 265 N.C. 601, 144 S.E.2d 835 (1965).

Applicable to Banking Corporations. — The 1965 amendment to this section shows that the General Assembly considered the provisions of this section applicable to banking corporations. *Cooke v. Outland*, 265 N.C. 601, 144 S.E.2d 835 (1965).

Stated in *Stohe v. Martin*, — N.C. App. —, 289 S.E.2d 898 (1982).

Cited in *Lowder v. All Star Mills, Inc.*, 301 N.C. 561, 273 S.E.2d 247 (1981).

§ 55-39. Appointment of provisional director.

(a) If the directors of a corporation are deadlocked in the management of the corporate affairs and the shareholders are unable to break the deadlock, and if injury to the corporation is being suffered or is threatened by reason thereof, the superior court of the county where the registered office of the corporation is located may, notwithstanding any provisions of the charter or bylaws of the corporation and whether or not an action is pending for an involuntary dissolution of the corporation, appoint a provisional director pursuant to this section.

(b) Action for such appointment may be filed by not less than one half of the directors or by the holders of not less than one third of the total outstanding shares of the corporation regardless of voting rights. Notice of such action shall be served upon the directors (other than those who have filed the action) and upon the corporation in the manner provided by law for service of a summons and complaint, and a hearing shall be held not less than 10 days after such service is effected. At such hearing all interested persons shall be given an opportunity to be heard.

(c) The provisional director shall be an impartial person, who is neither a shareholder nor a creditor of the corporation, nor related by blood or marriage to any of the other directors of the corporation, or to any judge of the court by which he is appointed. The provisional director shall have all the rights and powers of a director, and shall be entitled to notice of the meetings of the board of directors and to vote at such meetings, until he is removed by order of the court or by vote or written consent of the holders of a majority of the voting shares or holders of such higher number of voting shares as may be required under the charter or the bylaws for the election of directors. He shall be entitled to receive such compensation as may be agreed upon between him and the

corporation, and in the absence of such agreement he shall be entitled to such compensation as shall be fixed by the court. (1973, c. 469, s. 13.)

ARTICLE 5.

Corporate Finance.

§ 55-40. Authorized shares and restrictions thereon.

(a) A corporation shall have power to create and issue the number of shares fixed in its charter. Such shares may be divided into one or more classes, any or all of which may consist of shares with or without par value, with such designations, preferences, limitations, and relative rights, not inconsistent with the provisions of this Chapter, as shall be fixed in the charter or, as permitted by G.S. 55-42, in resolutions adopted by the shareholders or directors. The charter or said resolutions may limit or deny the voting rights of the shares of any class to the extent not inconsistent with the provisions of this Chapter.

Without limiting the foregoing authority, a corporation may, in accordance with its charter or the aforesaid resolutions, issue shares of preferred or special classes:

- (1) Subject to the right of the corporation to redeem at its option any such shares at the price fixed for the redemption thereof.
- (2) Entitling the holders thereof to cumulative, noncumulative or partially cumulative dividends.
- (3) Having preference over any other class or classes of shares as to the payment of dividends.
- (4) Having preference in the assets of the corporation over any other class or classes of shares upon the voluntary or involuntary liquidation of the corporation.
- (5) Convertible into shares of any class or into shares of any series of the same or any other class, except into a class of shares or into other securities having prior or superior rights and preferences as to dividends, income or distribution of assets upon liquidation. The provisions setting forth the rights of conversion may include any statement, not repugnant to law, for the protection of such rights against dilution or otherwise.

(b) Unless the provisions of the charter or of resolutions fixing the characteristics of shares, whether heretofore or hereafter issued, clearly indicate otherwise:

- (1) If preferred shares cumulative as to dividends are entitled to preferential payments on liquidation or dissolution, the amount of accrued dividends, as defined in this Chapter, shall be included in the amount of said preferential payment.
- (2) Shares entitled to preferences in payments of dividends or on liquidation or dissolution are not entitled to participate in said payments beyond the amount of their stated preferences.

(c) Notwithstanding the provisions of subsection (a)(2) of this section, authorizing the issuance of shares entitling the holders thereof to noncumulative or partially cumulative dividends, noncumulative preferred shares of a class out of which shares were initially issued after June 30, 1957, and before October 1, 1969, shall be entitled to a dividend credit, as defined in this Chapter, and until such dividend credit is fully discharged no dividend shall be paid to any shares that are subordinate to such preferred shares as to dividends.

(d) Unless the provisions of the charter or of resolutions fixing the characteristics of shares clearly indicate otherwise, if noncumulative shares, whether issued before or after the enactment of this Chapter, are entitled to preferential payments on liquidation or dissolution, the amount of any then existing dividend credit shall be added to the said preferential payment.

(e) Except in cases falling within G.S. 55-52(b)(4) or (5), no shares shall be hereafter authorized which purport to be redeemable at the election of the holder or which at the election of the holder purport to change his status to that of a creditor either at a designated time or upon a designated contingency. Nothing herein shall invalidate mandatory sinking fund requirements for the application of net earnings to the redemption of shares. This subsection shall not apply to building and loan associations or to land and loan associations. (1901, c. 2, s. 19; 1903, c. 660, ss. 2, 3; Rev., s. 1159; C.S., s. 1156; 1921, c. 116, s. 1; 1923, c. 155; C.S., s. 1167(a); 1925, c. 118, ss. 2, 2a; c. 262, s. 1; 1939, c. 199; 1949, c. 929; G.S., ss. 55-61, 55-73; 1953, c. 822, ss. 1, 3; 1955, c. 1371, s. 1; 1969, c. 751, ss. 15-17.)

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Preferred stock forms a part of the capital stock of the corporation, entitling the holders to all rights of the stockholder subject to the terms and conditions on which their stock was issued. *Kistler v. Caldwell Cotton Mills Co.*, 205 N.C. 809, 172 S.E. 373 (1934).

Preferred stockholder is not a creditor of the corporation, and must be confined to his rights as a stockholder. *Weaver Power Co. v. Elk Mt. Mill Co.*, 154 N.C. 76, 69 S.E. 747 (1910).

Priorities of preferred stock are always subject to the rights of creditors. So an attempt of the corporation to give the preferred stockholders a lien upon its realty in the nature of a mortgage or deed of trust under the provisions of its charter is ineffectual as to the prior rights of creditors. *Ellington v. Raleigh Bldg. Supply Co.*, 196 N.C. 784, 147 S.E. 307 (1929).

§ 55-40.1. Power of directors to issue shares.

Unless the charter or the bylaws otherwise provide, the board of directors of a corporation shall have the power by resolution duly adopted to issue from time to time any part or all of the authorized but unissued shares or dispose of its treasury shares, and to determine the time when, the terms upon which, and the consideration for which the corporation shall issue or dispose of such shares. (1959, c. 1316, s. 10.)

§ 55-41. Issuance of shares of preferred or special classes in series.

If so provided in the charter or in resolutions that are in accordance with G.S. 55-42, the shares of any preferred or special class may be divided into and issued in series. If the shares of any such class are to be issued in series, then each series shall be so designated as to distinguish the shares thereof from the shares of all other series and classes. Any or all of the series of any such class and the variations in the relative rights and preferences as between different series may be fixed and determined by the charter or by resolutions that are in accordance with G.S. 55-42, but all shares of the same class shall be identical except as to the following relative rights and preferences, as to which there may be variations between different series within a class:

- (1) The rate of dividend.
- (2) The price at and the terms and conditions on which shares may be redeemed.

- (3) The amount payable upon shares in event of involuntary liquidation.
- (4) The amount payable upon shares in event of voluntary liquidation.
- (5) Sinking fund provisions for the redemption or purchase of shares.
- (6) The terms and conditions on which shares may be converted, if the shares of any series are issued with the privilege of conversion. (1955, c. 1371, s. 1.)

§ 55-42. Determination by shareholders and directors of classification of shares.

(a) If the charter states that the shares are to be divided into classes but does not itself fix and does not expressly authorize the directors to fix the preferences, limitations and relative rights of the shares of each class, the same may, to the extent not fixed by the charter, be fixed by a resolution adopted at a shareholders' meeting by the vote of a majority of the shares of each class outstanding, whether or not such shares are otherwise entitled to vote. Such classes of shares may also by such resolution be divided into series within a class of preferred or special shares. Whenever a class is divided into series and the charter does not fix between the series the variations permitted by this Chapter and does not expressly authorize the directors to fix the same, the same may also be fixed by such resolution.

(b) If the charter or a resolution adopted at a shareholders' meeting by the vote prescribed by subsection (a) of this section expressly vests authority in the board of directors so to do, then, to the extent that the charter or shareholders' resolution does not fix the preferences, limitations or relative rights of any classes into which the shares are therein stated to be divided or to the extent that the charter or shareholders' resolution have not established series or have not fixed between series the variations permitted by this Chapter, the board of directors shall have the authority to fix the same by resolution adopted by the board.

(c) No provisions fixed by the shareholders or directors under this section purporting to confer upon any class of shares a priority with respect to dividends or distributions upon liquidation or dissolution over any then outstanding class of shares itself entitled to similar priority over other shares shall be valid.

(d) Nothing herein shall authorize resort to this section to effectuate any change in the preferences, limitations and relative rights, though fixed as permitted in this section, of any shares after their issuance.

(e) Prior to the issuance of any shares of a class or series of which the preferences, limitations or relative rights have been fixed by the shareholders or directors as permitted in this section, a statement of those preferences, limitations and relative rights, entitled Statement of Classification of Shares of (name of corporation), shall be executed by the corporation and filed in accordance with the provisions of G.S. 55-4, setting forth:

- (1) The name of the corporation.
- (2) The resolution or resolutions of the shareholders or board of directors relating to the fixing of the preferences, limitations and relative rights of the classes, or to the fixing of variations between series within a class.
- (3) As to any shareholders' resolution, a statement showing the number of shares of each class outstanding, the number of such shares present or represented at the meeting which adopted the resolution and the number of shares of each class voted for and against the resolution.
- (4) The date of the adoption of the foregoing resolution or resolutions. (1901, c. 2, s. 19; 1903, c. 660, ss. 2, 3; Rev., s. 1159; C.S., s. 1156; 1923, c. 155; 1925, c. 118, ss. 2, 2a; 1939, c. 199; G.S., s. 55-61; 1953, c. 822, s. 1; 1955, c. 1371, s. 1.)

§ 55-43. Subscriptions for shares.

(a) A preincorporation subscription is a promise or contract to take shares in a corporation to be organized and to pay the agreed price thereof to the corporation or to others for its benefit. A postincorporation subscription is a contract made with an existing corporation to purchase its shares, whether on original issue or as treasury shares, regardless of whether the status of the purchaser as shareholder is created at the time of making the contract or later.

(b) No preincorporation or postincorporation subscription is valid unless in writing, signed and delivered by the subscriber.

(c) A valid preincorporation subscription shall be irrevocable for six months, unless the terms of the subscription otherwise provide, or unless all of the subscribers consent to its revocation. At any time while a preincorporation subscription is irrevocable or remains unrevoked, it may be accepted by the corporation and, if otherwise conforming to law, shall thereupon become enforceable.

(d) The increase of stated capital effected by a subscription is determined by G.S. 55-47.

(e) No preincorporation or postincorporation subscription for shares shall contain provisions or be obtained upon oral or written representations that the payment of the shares subscribed is to be made out of subsequent earnings of the corporation or, except in a subscription by an employee, that the corporation (other than an investment company in cases within G.S. 55-52(b)(5) or a building and loan association) will subsequently repurchase the shares, or that the subscribed shares are entitled to any advantage or preference over other shares of the same class or series; provided, that nothing herein shall invalidate the provisions of written agreements falling within G.S. 55-52(b)(4). Any such provision or representation, or any oral condition purporting to qualify a written subscription, shall not be a defense against enforcement of the subscription or be grounds for rescission or for any other remedy against the corporation by the subscriber, but any promoter or agent of the corporation making or participating in making any such representation shall be liable to any subscriber for any loss resulting from reliance thereon, and any officer or director of a corporation who accepts a subscription which contains such provisions or which he knows was induced by such representations shall be similarly liable.

(f) Unless otherwise agreed in writing, it shall be no defense to the enforcement of a preincorporation subscription that no notice was given to the subscriber of his right to participate in selecting the first board of directors named in the charter, in adopting the first bylaws or in otherwise perfecting the organization.

(g) Unless otherwise provided in the subscription agreement, all subscriptions for shares shall be paid at such time, or in such installments and at such times, as shall be determined by the board of directors. Any call made by the board of directors, pursuant to such determination, for payment on subscriptions shall be uniform as to all shares of the same class or as to all shares of the same series, as the case may be.

(h) Regardless of whether the status of the purchaser as holder of the number of shares called for by the subscription has been created upon making the contract of subscription, either party thereto is entitled, upon default by the other and upon tender of his own performance or circumstances excusing such tender, to receive payment of the subscription price or delivery of the share certificate, as the case may be; and the election of the aggrieved party to assert such right shall, despite any alternative remedy by way of damages, entitle the parties to the same remedies as if the purchaser were the holder of said shares.

(i) In case of default in the payment of any balance, installment or call when such payment is due, the corporation may:

- (1) Bring action to collect any sum so due, without prejudice to any subsequent action to collect subsequent installments or calls. Until full payment is made the corporation shall have a lien on the subscribed shares, notwithstanding any judgment against the subscriber for the unpaid balance, and until sale of the shares pursuant to the judgment the lien is not lost by any preliminary or final execution upon said shares.
- (2) Bring action against the subscriber for damages for breach of the contract of subscription. If this remedy is pursued, title to any shares which may have passed to the subscriber under the subscription agreement reverts to the corporation upon entry of the judgment in favor of the corporation.
- (3) Rescind the subscription and keep as liquidated damages all prior payments up to ten percent (10%) of the subscription price and in such event the corporation shall remit to the subscriber forthwith any excess of such prior payments beyond said ten percent (10%).

(j) A subscription, whether unpaid or partly or fully paid, may be rescinded by the subscriber on the ground of fraud unless it is shown that any creditor or investor became such in actual reliance upon such subscription and would be prejudiced thereby, but this subsection shall not apply to representations of the kind designated in subsection (e) of this section.

(k) The board of directors shall have authority, unless otherwise restricted by the charter or bylaws, to determine in good faith whether and upon what terms the obligation of any subscriber shall be released, settled or compromised. The release of a subscription which has been accepted by the corporation is the equivalent of a purchase by the corporation of the shares in question and is subject to the restrictions and liabilities set forth in G.S. 55-32, 55-52 and 55-54 relating to such a purchase.

(l) No provision in any subscription shall, as against creditors, entitle the subscriber to the status of creditor with respect to any amount theretofore or thereafter paid under the terms of the subscription. (1901, c. 2, ss. 23, 24, 25; Rev., ss. 1169, 1170, 1171; C.S., s. 1165; G.S., s. 55-70; 1955, c. 1371, s. 1; 1969, c. 751, s. 18.)

§ 55-44. Conversion rights and option.

(a) Subject to any limitations or restrictions contained in this Chapter or in the charter, a corporation may, by action of its board of directors:

(1) In connection with the issuance of its bonds, debentures, notes or other obligations, grant to the holders thereof the right to convert them into shares, and

(2) Either in connection with the issuance of shares or other securities or independently thereof, grant options to purchase any of its shares.

(b) Every corporation shall include in its statement of assets and liabilities required by G.S. 55-37 a statement of the then current conversion ratio of any outstanding securities and a statement of the number of shares covered by any outstanding options and the price at which the options are exercisable.

(c) The instrument evidencing the security entitled to said conversion rights shall set forth, in full or by summary, the provisions and conditions of such rights, or shall be a share certificate complying with provisions of G.S. 55-57.

(d) A corporation may issue stock purchase warrants, subscription warrants, or other evidences of option rights, setting forth the terms, provisions and conditions thereof.

(e) Option rights may be transferable or nontransferable or separable or inseparable from the shares, obligations or other securities of the corporation.

(f) At the time of granting conversion or option rights the corporation shall reserve and continue to reserve sufficient authorized shares to meet the exer-

cise thereof but the failure of the corporation to do so shall not impair the right to claim damages from the corporation.

(g) The granting of rights to convert into shares which are subject to preemptive rights or of options to acquire such shares must be authorized by such action of the shareholders as would be required to release preemptive rights under the provisions of this Chapter, and such authorization shall operate as such release.

(h) Obligations or shares shall not be converted into shares having a greater aggregate par value than the face amount of the obligation so converted or than the par value of the shares so converted or than the stated capital represented by any no-par shares so converted, unless provision is made for the difference by a transfer from surplus to stated capital. (1955, c. 1371, s. 1; 1959, c. 1316, s. 11.)

Cross References. — As to convertibility of preferred or special classes, see § 55-40(a)(5).
As to employee options, see § 55-45.

§ 55-44.1. Rights of holders of debt securities.

In addition to any rights otherwise lawfully conferred, the charter of the corporation may confer upon the holders of any bonds, debentures or other debt obligations issued or to be issued by the corporation any one or more of the following powers and rights upon such terms and conditions as may be prescribed in the charter:

- (1) The power to vote on any matter either in conjunction with or to the full or partial exclusion of its shareholders.
- (2) The right to inspect the corporate books and records.
- (3) Any other rights concerning the corporation which its shareholders have or may have.

Any such power or right shall not be diminished, as to bonds, debentures or other obligations then outstanding, except by an amendment of the charter approved by the vote or written consent of the holders of a majority in principal amount thereof or such larger percentage as may be specified in the charter. (1969, c. 751, s. 19.)

§ 55-45. Sale of shares and options to employees.

(a) Subject to the provisions contained in this Chapter or in its charter or bylaws, a corporation may provide for and carry out a plan for the sale or other disposition of its unissued or treasury shares, including but not limited to the issuance of rights or options to acquire such shares, to its employees or to the employees of its subsidiary corporations or to a trustee on their behalf. Such plan may include provisions, among others, for the kind and amount of consideration, payment in installments or at one time; aiding any such employees in paying for such shares by compensation for services, by loans, or otherwise; limiting the transferability of such shares, rights or options; the fixing of eligibility for participation in the plan; the class and price of shares to be sold under the plan; the number of shares which may be purchased, the method of payment therefor, the reservation of title until full payment; the effect of termination of employment; an option or obligation on the part of the corporation to repurchase the shares; and the time limits and termination of the plan; provided, however, that if the corporation providing for any such plan has fewer than 10 shareholders, such plan shall be approved by a majority of the outstanding shares of such corporation unless the charter of the corporation provides that such approval is not required. The term "employees," as used in

this section, includes officers in the full-time employment of the corporation, but nothing in this section is intended to permit financial aid to such officers in violation of G.S. 55-22.

(b) In any actions by, against or in behalf of a corporation to challenge the validity of any stock option granted to any employee, the situs of the option is deemed to be at the registered office of the corporation, and such action may be brought as an action quasi in rem with service of process by publication or outside the State as provided by law. Such action may also be brought as an action in personam. If two or more grantees of stock options are necessary or proper parties, they may be joined in accordance with the provisions of law applicable to class actions. (1955, c. 1371, s. 1; 1959, c. 1316, s. 12; 1973, c. 469, s. 14; 1975, c. 303; 1979, c. 508, s. 1.)

Cross References. — As to preemptive right to shares sold to employees or options, see § 55-56(c)(4).

§ 55-46. Consideration for shares.

(a) Shares of a corporation shall not be issued as fully or partly paid nor shall treasury shares be disposed of except for:

- (1) Money or property, tangible or intangible, received by, or inuring to the benefit of, the corporation, or
- (2) Labor or services actually rendered to the corporation, or for its benefit in its organization or reorganization, or
- (3) Shares, securities or other obligations of the corporation actually surrendered, canceled or reduced, or
- (4) Satisfaction of accrued dividends or dividend credits that have arisen with respect to preferred shares, or
- (5) Amounts transferred from surplus to stated capital.

(b) Neither promissory notes nor other obligations of a subscriber or purchaser, including any endorsement or guaranty or any obligation of the corporation, shall constitute payment or part payment to a corporation for its shares. An agreement of a person to perform future services as the consideration for shares shall not constitute payment prior to the performance of such services.

(c) Subject to the further restrictions set forth in this section and to the provisions of G.S. 55-53:

- (1) Shares having par value, other than treasury shares, shall not be issued for a consideration less than their par value, except that they may be issued as fully paid at such discount from their par value as does not exceed reasonable expense and compensation incurred in the sale or underwriting of such shares.
- (2) Shares without par value and treasury shares may be issued or disposed of for such consideration, expressed in dollars, as the board of directors may determine.

(d) That part of the surplus of a corporation which is transferred to stated capital upon the issuance of shares as a share dividend shall be deemed to be pro tanto consideration for the issuance of such shares.

(e) In the event of a conversion or exchange of shares with or without par value into or for the same or into or for a different number of shares with or without par value, whether of the same or a different class or classes, the consideration for the shares so issued in exchange or conversion shall be deemed to be:

- (1) The stated capital then represented by the shares so exchanged or converted irrespective of the actual value of such shares, and

- (2) That part of surplus, if any, transferred to stated capital upon the issuance of shares for the shares so exchanged or converted, and
- (3) Any additional consideration paid to the corporation upon the issuance of shares for the shares so exchanged or converted.

(f) When shares are issued or disposed of by a corporation, in transactions other than those mentioned in subsection (e) of this section for any consideration other than money or satisfaction of dividend accruals or dividend credits, the board of directors shall state by resolution their determination of the fair value to the corporation of such consideration unless the amount of the consideration is determined by the provisions of this section. In the absence of fraud or bad faith, the judgment of the directors as to the value of the consideration received for shares shall be conclusive. When the consideration for the issuance of shares is the satisfaction of any liquidated indebtedness of the corporation or of any accrued dividends or dividend credits that have arisen with respect to preferred shares, the fair value of the consideration so received may be determined to be the face amount of the indebtedness or of the accrued dividends, or dividend credits so satisfied and no inference of fraud or bad faith arises from such determination.

(g) Shares issued or disposed of for the kind and amount of consideration prescribed by this section shall be deemed fully paid and nonassessable. (1901, c. 2, ss. 19, 53, 54; 1903, c. 660, ss. 2, 3; Rev., ss. 1159, 1160, 1161; C.S., ss. 1157, 1158; G.S., ss. 55-62, 55-63; 1955, c. 1371, s. 1; 1957, s. 1039; 1959, c. 1316, ss. 13, 14; 1969, c. 751, s. 20; 1973, c. 469, ss. 15, 45.2.)

CASE NOTES

Editor's Note. — Many of the cases below were decided under former law.

Purpose Is to Prevent Fraud. — Former § 55-62 was passed in order that stock subscriptions should be protected in their integrity and not become a means of deceiving those who dealt with the corporation. *Goodman v. White*, 174 N.C. 399, 93 S.E. 906 (1917).

Effect of Charter Provision that Stock Be Issued as Fully Paid. — A provision in the charter of an incorporated company that the capital stock "shall be issued as full-paid stock" does not permit shares of stock to be issued to stockholders without payment for it by them in money, or its equivalent in property at an honest valuation. *Clayton v. Ore Knob Co.*, 109 N.C. 385, 14 S.E. 36 (1891).

Cash Payment Unnecessary. — It is not essential to a bona fide subscription to stock in a corporation that there be a present payment in cash by the subscriber, or that he be solvent; a subscription is considered bona fide whenever made by one who subscribes in good faith, with reasonable expectation and apparent prospect of being able to pay assessments on his stock as they may thereafter be called for. *Boushall v. Myatt*, 167 N.C. 328, 83 S.E. 352 (1914).

Conditional Subscription. — A subscription to stock of a corporation may be made on condition that there shall be no liability until the corporation has received actual subscriptions to its capital stock to a specified amount.

Alexander v. North Carolina Sav. Bank & Trust Co., 155 N.C. 124, 71 S.E. 69 (1911). See *Penniman v. Alexander*, 111 N.C. 427, 16 S.E. 408 (1892); *Kelly v. Oliver*, 113 N.C. 442, 18 S.E. 698 (1893); *Queen City Printing & Paper Co. v. McAden*, 131 N.C. 178, 42 S.E. 575 (1902).

Burden of Proof as to Value of Property. — The burden of proving that the property was taken in payment at its true value, and, further, that such value was approved by a board of directors acting independently in the interest of the corporation, is upon the person who alleges payment. *Goodman v. White*, 174 N.C. 399, 93 S.E. 906 (1917).

Proceedings Where Property Fraudulently Overvalued. — Although a margin may be allowed for an honest difference of opinion as to value, a valuation grossly excessive, knowingly made while its acceptance may bind the corporation, is a fraud on creditors, and they may proceed against the stockholders who sell the property individually, as for an unpaid subscription. *Hobgood v. Ehlen*, 141 N.C. 344, 53 S.E. 857 (1906); *Goodman v. White*, 174 N.C. 399, 93 S.E. 906 (1917).

Evidence of Fraud. — In an action by the receivers of an insolvent corporation to compel the payment of a subscription to stock issued for property acquired by the corporation for the conduct of the business, evidence tending to show a grossly excessive valuation of the prop-

erty by the directors, knowingly made, is strong evidence of fraud, and may be conclusive thereof. *Whitlock v. Alexander*, 160 N.C. 465, 76 S.E. 538 (1912).

Nonsuit Properly Granted Absent Fraud.

— The judgment of the board of directors, in fixing the value of property to be accepted in lieu of money is conclusive in the absence of fraud; and in a suit to recover on stock subscription, where there is no evidence of fraud, a judgment as of nonsuit is properly granted. *Gover v. Malever*, 187 N.C. 774, 122 S.E. 841 (1924).

Illegal Transaction by Promoter. — A transaction whereby a promoter borrowed a certain sum and bought a half interest in a company, and let the company that he was promoting take it over as soon as it was incorporated, and pay his note, and also issue to him stock as the consideration, was illegal. *Goodman v. White*, 174 N.C. 399, 93 S.E. 906 (1917).

Quoted in *Short v. Commissioner*, 302 F.2d 120 (4th Cir. 1962).

§ 55-47. Determination of stated capital.

(a) As used in this section with respect to shares, the term "issued" refers to all shares that have been subscribed and whose subscribers have the status of shareholders, even though the shares have not been paid in full, and even though no certificate therefor has been issued, but does not include the reissue of treasury shares.

(b) A corporation shall have a stated capital, which except as reduced in accordance with this Chapter, shall be an amount in dollars equal to the sum of:

- (1) The aggregate par value of all shares having par value which have been issued from time to time, and
- (2) The entire amount of the agreed consideration received or to be received by the corporation for all shares without par value which have been issued from time to time, except such portion thereof as the board of directors prior to or at the time of issuance of such shares designates as paid-in surplus and such portion thereof as may be entered as earned surplus as permitted by G.S. 55-49(k), and
- (3) Such amounts, not included in subdivision (1) or (2) of this subsection as are transferred from surplus to stated capital upon declaration of a share dividend, and
- (4) Such amounts as are transferred from surplus to stated capital represented by shares without par value by resolution of the board of directors without declaration of a share dividend.

(c) If par value shares are issued for a consideration in excess of their par value, the excess shall be credited to paid-in surplus; if issued at a discount as permitted by G.S. 55-46(c) the amount of the discount may be entered on the books as a debit and be separately shown in financial statements, in accordance with generally accepted principles of sound accounting practice or good business practice.

(d) Whenever the status of shareholder is created by the acceptance of a preincorporation subscription or the making of a postincorporation subscription contract, the corporation shall thereupon credit to its stated capital account such sum as would be so credited upon full payment for the shares in question, and any unpaid balance shall be debited to a separate account designated as balance on unpaid shares or otherwise appropriately designated.

(e) The stated capital of a corporation may be increased from time to time upon declaration of a share dividend or by resolution of the board of directors directing that all or a part of the surplus be transferred to stated capital. The board of directors may direct that the amount of surplus transferred without declaration of a share dividend shall be allocated as stated capital in respect of any designated class of shares without par value.

(f) When any number of its shares with or without par value are changed, exchanged, converted, subdivided or consolidated for or into any number of shares, with or without par value, any shares thereby surrendered to the

corporation shall be deemed to be canceled even if no formal steps to that effect are taken, and, subject to any adjustment to be made if additional consideration is to be paid:

- (1) If the stated capital represented by the shares so canceled is the same as that of the shares issued therefor, the aggregate stated capital of the corporation is not changed;
- (2) If the stated capital represented by the canceled shares is greater than that represented by the shares issued therefor, no reduction of stated capital is legally effective unless proceedings are taken in accordance with this Chapter to reduce the stated capital;
- (3) If the stated capital represented by the shares so canceled is less than that represented by the shares issued therefor, the stated capital of the corporation shall be deemed increased accordingly and adjustment of accounts appropriate thereto shall be made.

(g) Notwithstanding any other provisions of this section, if shares are issued in cancellation or satisfaction of dividend accruals or of dividend credits that have arisen with respect to preferred shares, the board of directors shall determine the amount of stated capital to be represented by the shares so issued, which amount shall be not less than the par value, if any, of the shares so issued, and either:

- (1) The stated capital of the corporation may remain the same by debiting against the stated capital represented by any then outstanding shares without par value an amount equal to the stated capital represented by the shares so issued and no proceedings for the reduction of stated capital are thereby required, or
- (2) The stated capital of the corporation may be increased by a transfer from any surplus to stated capital of an amount equal to the stated capital represented by the shares being so issued, and if there is no surplus the aforesaid amount may be transferred to stated capital even though a deficit is thereby created or increased, or
- (3) The stated capital of the corporation may be reduced, in accordance with the provisions of G.S. 55-48, so as to create a surplus from which an amount can be transferred to stated capital with respect to the shares so issued. (1955, c. 1371, s. 1; 1973, c. 469, s. 16.)

CASE NOTES

As to "capital stock" of corporation under former law, see *Hill v. Pioneer Lumber Co.*, 113 N.C. 173, 18 S.E. 107 (1893); *Merchants Nat'l Bank v. Newton Cotton Mills*, 115

N.C. 507, 20 S.E. 765 (1894); *Gilmore v. Smathers*, 167 N.C. 440, 82 S.E. 823 (1914); *Person v. Board of State Tax Comm'rs*, 184 N.C. 499, 115 S.E. 336 (1922).

§ 55-48. Reduction of stated capital.

(a) Whenever, as a result of an amendment of the charter reducing the par value of outstanding shares or of a merger effected in accordance with the provisions of this Chapter, the stated capital of the corporation is reduced, no further proceedings are necessary to consummate a reduction of stated capital.

(b) Subject to the provisions of subsection (d) of this section, the stated capital of a corporation may be reduced by a resolution of the shareholders determining that the stated capital represented by the shares without par value, or any class of such shares, be reduced as stated in the said resolution. The said resolution shall be adopted by the shareholders by such vote and at such meeting and pursuant to such notice thereof, as would be required under G.S. 55-100 for an amendment of the charter if the shares being so reduced were shares having par value.

(c) Subject to the provisions of subsection (d) of this section, the stated capital of a corporation may be reduced, pursuant to action taken by the board of directors to that effect, without assent of the shareholders:

- (1) By the cancellation of any shares purchased, redeemed or otherwise acquired by the corporation except shares acquired through exchange of shares or conversion of convertible shares, and thereby the stated capital of the corporation shall be reduced by the amount of stated capital represented by the shares so canceled; or
- (2) By the exchange of shares or conversion of convertible shares for or into shares representing an amount of stated capital less than that represented by the shares surrendered upon such exchange or conversion, in which event the stated capital of the corporation shall be deemed reduced by the difference; or
- (3) By the release of shares subject to the limitations of G.S. 55-43(k), other than treasury shares, from subscription, in which event the stated capital of the corporation shall be deemed reduced by the amount of stated capital represented by the released shares.

(d) To effectuate a reduction of stated capital pursuant to subsections (b) and (c) of this section there shall be executed and filed, in accordance with the provisions of G.S. 55-4, a certificate of reduction of capital, which shall set forth:

- (1) The name of the corporation.
- (2) A statement that the purpose of the certificate is to consummate a reduction of stated capital and a statement of the manner in which such reduction is being effected.
- (3) The number of issued shares, itemized by classes and series, if any, and the amount of stated capital represented thereby, before the reduction.
- (4) The number of issued shares, itemized by classes and series, if any, and the amount of stated capital represented thereby, after the reduction.
- (5) The total amount by which the stated capital is being reduced by virtue of this certificate.
- (6) Either a statement that no action by the shareholders is necessary to effect the foregoing reduction or a statement showing the number of shares outstanding, the number of shares entitled to vote on the reduction, and the number of shares voted for and against the reduction.

(e) If it is desired to take concurrent action to amend the charter and also to effect the reduction of stated capital, whether effected through such an amendment as indicated in subsection (a) of this section or effected otherwise as indicated in subsections (b) and (c) of this section, the statement to be executed by the corporation and filed, in accordance with the provisions of G.S. 55-4, may be designated as articles of amendment and certificate of reduction of stated capital.

(f) Unless made in violation of contract, distributions made to shareholders after a reduction of stated capital and made as authorized in this Chapter give rise to no cause of action in favor of creditors, regardless of whether their claims arose before or after the reduction. (1901, c. 2, s. 19; 1903, c. 660, ss. 2, 3; Rev., s. 1159; C.S., s. 1156; 1923, c. 155; 1925, c. 118, ss. 2, 2a; 1939, c. 199; G.S., s. 55-61; 1953, c. 822, s. 1; 1955, c. 1371, s. 1; 1959, c. 1316, s. 15.)

CASE NOTES

As to decrease of capital stock of corporation under former law, see *Heggie v. Peoples Bldg. & Loan Ass'n*, 107 N.C. 581, 12 S.E. 275 (1890); *Weaver Power Co. v. Elk Mt. Mill*

Co., 154 N.C. 76, 69 S.E. 747 (1910); *Meisenheimer v. Alexander*, 162 N.C. 226, 78 S.E. 161 (1913); *Thompson v. Shepherd*, 203 N.C. 310, 165 S.E. 796 (1932).

§ 55-49. Surplus, net profits and valuation of assets.

(a) Surplus is the excess of a corporation's net assets, as defined in this Chapter, over its stated capital. Such surplus consists of earned surplus or capital surplus or both, and shall be so classified on the books.

(b) Except where provisions of this Chapter specifically require a different standard or impose additional limitations, the assets of a corporation may, for the purpose of determining the lawfulness of dividends or of distributions or withdrawals of corporate assets to or for the shareholders, be carried on the books in accordance with generally accepted principles of sound accounting practice applicable to the kind of business conducted by the corporation.

(c) For the purpose of determining the lawfulness of dividends or of the purchase or redemption of shares, treasury shares shall not be counted as assets.

(d) Earned surplus is the portion of the surplus of a corporation equal to the balance of its net profits; income, gains and losses, including gains and losses realized from the disposition or destruction of fixed assets (but not including unrealized appreciation in the value of any assets), from the date of incorporation, after deducting subsequent distributions to shareholders and transfers to stated capital and to capital surplus to the extent that such distributions and transfers are made out of earned surplus, and after adding all transfers made from capital surplus as permitted by subsection (i) of this section, all computed in accordance with generally accepted principles of sound accounting practice applicable to the kind of business conducted by the corporation.

(e) Capital surplus is the entire surplus of the corporation other than its earned surplus, and includes, without being limited to, paid-in surplus, surplus arising from reduction of stated capital and surplus arising from a revaluation of assets made in good faith upon demonstrably adequate bases of revaluation. Capital surplus may be classified on a corporation's books and statements according to its derivation.

(f) A surplus arising from the sale of treasury shares at a price in excess of the cost of their acquisition or from the retirement of treasury shares acquired at a price less than the amount of capital reduction to be effected by their retirement is not earned surplus and shall be accounted for as capital surplus or as some classification thereof.

(g) In computing earned surplus or net profits, deduction shall be made for such obsolescence, depletion, depreciation, losses, bad debts and other items as accords with generally accepted principles of sound accounting practice.

(h) Repealed by Session Laws 1969, c. 751, s. 45.

(i) A corporation may, by resolution of its board of directors, apply any part or all of its capital surplus to the reduction or elimination of any deficit in the earned surplus account but if there are outstanding shares entitled to preferential dividends, such action must be approved by the vote of a majority of such shares.

(j) A corporation may, by resolution of its board of directors, create or add to a reserve or reserves out of its earned surplus or current net profits for any proper purpose set forth in the resolution, and may abolish or diminish any such reserve upon determination by the board of directors that such reserve is no longer necessary or that it is in excess of the amount required for the purpose for which it was created; but no such reserve shall, except in accordance with generally accepted principles of sound accounting practice applicable to the kind of business conducted by such corporation, diminish the amount of earned surplus or net profits available for dividends.

(k) Whenever two or more corporations are consolidated or merged, or whenever a corporation purchases all or substantially all of the outstanding shares or assets of another corporation as a going concern and pays all or

substantially all the purchase price by the issuance of shares of the purchasing corporation, or whenever a corporation is reorganized, the earned surplus appearing on the books of the constituent or merged or purchased corporation or corporations or on the books of a corporation prior to reorganization may, to the extent that it is not capitalized, be entered as earned surplus on the books of the resultant or purchasing or reorganized corporation.

(1) Where a parent corporation acquires and owns a majority of the shares of a subsidiary corporation or where a group of parent corporations in pursuit of a common interest acquires and owns all or substantially all of the shares of a subsidiary corporation, a share dividend received by such a parent corporation or parent corporations out of surplus earned by the subsidiary after said acquisition may be treated by the recipient parent corporation as earned income in an amount corresponding, pro rata, to the amount of earned surplus of the subsidiary which was capitalized by virtue of the share dividend. (1955, c. 1371, s. 1; 1969, c. 751, ss. 21, 45; 1973, c. 469, s. 17.)

CASE NOTES

Quoted in *Watson v. Watson Seed Farms, Inc.*, 253 N.C. 238, 116 S.E.2d 716 (1960).

§ 55-50. Dividends in cash or property.

(a) Subject to the restrictions provided in this section, the board of directors of a corporation may declare and pay dividends payable in cash or in property:

- (1) Out of the earned surplus of the corporation, or
- (2) Out of the amount of net profits earned during the current or preceding accounting period, each said period to be not less than six months or more than one year in duration, regardless of any impairment of stated capital, or
- (3) Out of the capital surplus of the corporation, but such dividends from this source may be paid only if the sources in subdivisions (1) and (2) of this subsection are unavailable and then only to shares entitled to preferential dividends and no capital surplus paid in by any class of stock may be used for the payment of dividends on any class junior thereto, or
- (4) In partial liquidation as permitted by subsection (e) of this section. A dividend paid from sources other than those indicated in subdivisions (1) and (2) of this subsection to shares not entitled to preferential dividends is a partial liquidation and is subject to the provisions of subsection (e) of this section.

(b) Any provision inserted in any charter or bylaws or resolutions or agreement of the shareholders after this Chapter becomes effective purporting to make unavailable the sources mentioned in subdivisions (1), (2) and (3) of subsection (a) of this section for the payment of dividends to shares entitled to preferential dividends shall be null and void, but nothing herein shall invalidate any agreement between a corporation and its creditors restricting the payment of dividends.

(c) No dividend payable in cash or in property may be declared or paid if upon the payment thereof:

- (1) There is reasonable ground for believing that the corporation would be unable to meet its obligations as they become due in the ordinary course of business, or
- (2) The liabilities of the corporation would exceed the fair present value of its assets, or

- (3) The highest aggregate liquidation preferences of shares entitled to such preference over the shares receiving the dividend would exceed the corporation's net assets.

(d) Subject to any provisions contained in its charter, for the purpose of paying a dividend out of earned surplus or net profits as permitted by subsection (a) of this section, a corporation engaged in the business of exploiting natural resources, patents, copyrights, leaseholds, and other assets wasting in a similar manner, or engaged primarily in the liquidation of specific assets, may compute its earned surplus or net profits derived from such exploitation or liquidation without taking into consideration the depletion or amortization of such assets resulting from lapse of time or from consumption, liquidation, or exploitation of such assets. If a dividend is paid from a source so computed, the corporation shall make the disclosure required by subsection (g) of this section.

(e) The board of directors of a corporation may distribute to its shareholders in partial liquidation, out of capital surplus (including a surplus created by reduction of stated capital), a portion of its assets, subject to the following provisions:

- (1) Except in a case within subdivision (2) of this subsection, the distribution shall be made only upon a determination by the board of directors that the assets of the corporation are in excess of the needs of its business, and upon authorization by a resolution adopted by the holders of a majority of the shares of each class, whether or not otherwise entitled to vote, and the distribution shall be made pro rata to the class or classes of shareholders as specified in the said resolution. Such distribution is not deemed to be a liquidation within the liquidation preferences to which any class of shares may be entitled, unless the charter otherwise provides.
- (2) If the corporation is organized for the purpose of liquidating specific assets (otherwise than by the exploitation of natural resources) and is solely engaged in that activity, the distribution may be made as specifically provided in the charter with respect to such a distribution, without the vote of shareholders and without regard to the provisions of subsection (g) of this section.
- (3) In addition to all other restrictions upon the payment of dividends imposed by this section, no distribution permitted by this subsection shall be made if thereupon the present fair value of the assets of the corporation is less than twice the amount of its liabilities.

(f) Partly paid shares are entitled to participate in dividends on the basis of the percentage of the consideration actually received by the corporation thereon, unless the charter or subscription agreement provides for lesser dividend payments.

(g) Concurrently with the payment of a dividend the corporation shall disclose to the shareholders receiving the same the source from which the dividend is paid if it is paid:

- (1) Otherwise than out of earned surplus, or
- (2) Out of earned surplus if within one year prior to the dividend payment a deficit in the earned surplus account has been reduced or eliminated as permitted by G.S. 55-49(i), or
- (3) Out of earned surplus or net profits computed without deduction for depletion of natural resources.

(h) The provisions of the foregoing subsections shall not apply to banks, insurance companies, and investment companies registered under the Investment Company Act of 1940.

(i) Repealed by Session Laws 1969, c. 751, s. 45.

(j) Nothing in this section shall impair any rights which a shareholder may have on general principles of equity to compel the payment of dividends, but, except for actions started before this Chapter becomes effective, all rights

previously conferred by statute upon shareholders to force a corporation to pay dividends are hereby abrogated.

(k) Any action by a shareholder to compel the payment of dividends may be brought against the directors, or against the corporation with or without joining the directors as parties. The shareholder bringing such action shall be entitled, in the event that the court orders the payment of a dividend, to recover from the corporation all reasonable expenses, including attorney's fees, incurred in maintaining such action. If a court orders the payment of a dividend, the amount ordered to be paid shall be a debt of the corporation.

(l) As used in this subsection, net profits shall mean such net profits as can lawfully be paid in dividends to a particular class of shares after making allowance for the prior claims of shares, if any, entitled to preference in the payment of dividends, but in the determination of such profits the provisions of subsection (d) of this section shall not apply. If during its immediately preceding fiscal period a corporation having less than 25 shareholders on the final day of said period has not paid to any class of shares dividends in cash or property amounting to at least one third of the net profits of said period allocable to that class, the holder or holders of twenty percent (20%) or more of the shares of that class may, within four months after the close of said period, make written demand upon the corporation for the payment of additional dividends for that period. After a corporation has received such a demand, the directors shall, during the then current fiscal period or within three months after the close thereof, either (i) cause dividends in cash or property to be paid to the shareholders of that class in an amount equal to the difference between the dividends paid in said preceding fiscal period to shareholders of that class and one third of the net profits of said period allocable to that class, or in such lesser amount as may be demanded, or (ii) give notice pursuant to subsection (m) of this section to all shareholders making such demand. A corporation shall not, however, be required to pay dividends pursuant to such demand insofar as (i) such payment would exceed fifty percent (50%) of the net profits of the current fiscal period in which such demand is made, or (ii) the net profits are being retained to eliminate a deficit, or (iii) the payment of dividends would be a breach of a bona fide agreement between the corporation and its creditors restricting the payment of dividends, or (iv) the directors of the corporation can show that its earnings are being retained to meet the reasonably anticipated needs of the business and that such retention of earnings is not inequitable in light of all the circumstances. Upon receipt of such a demand a corporation may elect to treat any dividend previously paid in the current fiscal period as having been paid in the preceding fiscal period, in which event the corporation shall so notify all shareholders. If a dividend is paid in satisfaction of a demand made in accordance with this subsection it shall be deemed to have been paid in the period for which it was demanded, and all shareholders shall be so informed concurrently with such payment.

(m) Upon receipt of a demand from the holders of twenty percent (20%) or more of the shares of any class of shares pursuant to subsection (l) of this section, the corporation receiving such demand may, during the then fiscal period or within three months after the close thereof, give written notice to each shareholder making such written demand that the corporation elects to redeem all shares held by such shareholder in lieu of the payment of dividends as provided in subsection (l) of this section and shall pay to such shareholder the fair value of his shares as of the day preceding the mailing or otherwise reasonably dispatching of the notice. A shareholder receiving such notice shall thereafter be entitled to withdraw his dividend demand by giving written notice of such withdrawal to the corporation within 10 days after receipt of the redemption notice of the corporation or, if no such withdrawal is made, to receive the fair value of his shares, subject only to the surrender by him of the

certificate or certificates representing his shares and to the provisions of G.S. 55-52, which value shall be determined and paid as follows:

- (1) If within 30 days after the date upon which a shareholder becomes entitled to payment for his shares under this subsection, the value of the shares is agreed upon between the shareholder and the corporation, payment therefor shall be made within 60 days after the agreement, upon surrender of the certificate representing the shares, whereupon the shareholder shall cease to have any interest in such shares or in the corporation.
- (2) If within the such 30-day period the shareholder and the corporation do not agree as to the value of the shares, the shareholder may, within 60 days after the expiration of the 30-day period, file a petition in the superior court of the county of the registered office of the corporation asking for the appointment by the clerk of three qualified and disinterested appraisers to appraise the fair value of the shares. A summons as in other cases of special proceedings, together with a copy of the petition, shall be served on the corporation at least 10 days prior to the hearing of the petition by the court. The award of appraisers, or a majority of them, if no exceptions be filed thereto within 10 days after the award shall have been filed in court, shall be confirmed by the court, and when confirmed shall be final and conclusive, and the shareholder upon depositing the proper share certificates in court, shall be entitled to judgment against the corporation for the appraised value thereof as of the date prescribed in this section, together with interest thereon to the date of such confirmation. If either party files exceptions to such award within 10 days after the award shall have been filed in court, the case shall be transferred to the civil issue docket of the superior court for trial during term and shall be there tried in the same manner, as near as may be practicable, as is provided in Chapter 40 for the trial of cases under the eminent domain law of this State, and with the same right of appeal as is permitted in said Chapter. The court shall assess the cost of said proceedings as it shall deem equitable. Upon payment of the judgment the shareholder shall cease to have any interest in the shares or in the corporation and the corporation shall be entitled to have said share certificates surrendered to it by the clerk of court for cancellation. Unless the shareholder shall file such petition within the time herein prescribed, he and all persons claiming under him shall have no right of payment hereunder but in that event nothing herein shall impair his status as shareholder.

Shares acquired by a corporation pursuant to payment of the agreed value thereof or to payment of the judgment entered therefor, as in this subsection provided, may be held and disposed of by the corporation as in the case of other treasury shares. (Code, s. 681; 1901, c. 2, ss. 33, 52; Rev., ss. 1191, 1192; C.S., ss. 1178, 1179; 1927, c. 121; 1933, c. 354, s. 1; G.S., ss. 55-115, 55-116; 1955, c. 1371, s. 1; 1959, c. 1316, s. 16; 1965, c. 726; 1969, c. 751, ss. 22, 45; 1973, c. 469, ss. 18-20; c. 683; c. 1087, ss. 3-5; 1975, c. 19, s. 17; c. 304.)

Editor's Note. — Chapter 40, referred to in this section, was repealed by Session Laws 1981, c. 919. See now Chapter 40A.

Legal Periodicals. — For note on the 1965 amendments to this Chapter, see 44 N.C.L. Rev. 1106 (1966).

CASE NOTES

Joinder of Suit for Failure to Declare Dividends with Cause of Action for Liquidation. — A stockholder in a corporation may sue the corporation, and join its directors as defendants, for failure to declare adequate dividends from the corporation's earnings; and may join therewith a second cause of action for liquidation and involuntary dissolution of the corporation based upon bad faith management in suppressing dividends and in deflating the

value of the corporation's assets, thus precluding the plaintiff stockholder from obtaining either a fair dividend or a fair market value for his stock. *Dowd v. Charlotte Pipe & Foundry Co.*, 263 N.C. 101, 139 S.E.2d 10 (1964).

As to suits in equity to compel declaration and payment of dividends, see *Gaines v. Long Mfg. Co.*, 234 N.C. 331, 67 S.E.2d 355 (1951).

§ 55-51. Share dividends.

(a) Subject to the restrictions provided in this section, the board of directors of a corporation may declare and pay dividends in its own authorized but unissued shares out of any surplus of the corporation upon the following conditions:

- (1) If a dividend is payable in its own shares having a par value, such shares shall be issued at not less than the par value thereof and there shall be transferred to stated capital at the time such dividend is paid an amount of surplus equal to the aggregate par value of the shares to be issued as a dividend. If such shares are issued at more than the par value thereof, an amount of surplus equal to the excess over the aggregate par value of the shares shall be credited to a capital surplus account in accordance with generally accepted principles of sound accounting practice applicable to the kind of business conducted by the corporation.
- (2) If a dividend is payable in its own shares without par value, such shares shall be issued at a value to be ascertained and stated by the board of directors by resolution adopted at the time such dividend is declared, and there shall be transferred to stated capital at the time such dividend is paid an amount of surplus equal to the aggregate value so ascertained and stated in respect of such shares; and the amount per shares so transferred to stated capital shall be disclosed to the shareholders receiving such dividend concurrently with the payment thereof.

(b) No dividend payable in shares of any class shall be paid to the holders of shares of any other class nor shall any share dividend be paid to holders of shares entitled to preferential dividends nor shall any share dividend be paid which would change the voting position of different classes of shares with respect to voting for directors, unless:

- (1) The share dividend is paid to holders of shares entitled to preferential payment of dividends which by the charter are required or permitted to be paid in a specified number of shares, whether of that same class or of another designated class, or
- (2) The share dividend is specifically authorized by the vote of a majority of shares of each class that might be adversely affected by such a share dividend. Such vote may, if so stated in the resolution of the shareholders, be effective authorization to the directors for one year thereafter for the declaration and payment of such a share dividend if the amount of said dividend is specifically fixed or limited for the shares which are to receive it as stated.

(c) Disclosure similar to that required by G.S. 55-50(g) shall be made if a share dividend is paid from a source which in the case of cash dividends would require disclosure under G.S. 55-50(g).

(d) A corporation making a distribution of treasury shares among its shareholders shall, concurrently with delivery of the corresponding certificate or script, designate the transaction as a distribution of treasury shares and shall not represent it to be a share dividend.

(e) A split-up or division of the issued shares of any class into a greater number of shares of the same class without increasing the stated capital of the corporation shall not be construed to be a share dividend within the meaning of this section. (1955, c. 1371, s. 1; 1959, c. 1316, ss. 17, 18.)

§ 55-52. Acquisition by a corporation of its own shares.

(a) A corporation may acquire its own shares by gift, bequest, merger, consolidation, distribution of the assets of another corporation, exchange of its shares or as permitted in this section by purchase or redemption.

(b) Subject to the provisions of subsection (e) of this section, a corporation may, by action of its board of directors, purchase and pay for its shares, or redeem such shares if redeemable, regardless of any impairment of stated capital, in the following cases:

- (1) To collect, settle, compromise or release in good faith a debt of or claim against any shareholder or subscriber of its shares;
- (2) To eliminate fractional shares or to avoid their issuance;
- (3) To satisfy claims of dissenting shareholders entitled to payment for their shares under the provisions of G.S. 55-113;
- (4) To perform its obligation or exercise its right to purchase shares of an employee or former employee under a written agreement relating to the employment, or to perform its obligation or exercise its right under a written agreement to purchase shares of a deceased or disabled shareholder upon death or disability;
- (5) If the corporation is organized to engage in the business of investing in securities and is engaged in no other business, to perform its agreement to repurchase its shares, at prices substantially equivalent to their proportionate interests in the assets of the corporation;
- (6) Subject also to the provisions of subsection (f) of this section, to acquire for retirement, at prices not exceeding their redemption price, its shares that are subject to redemption.

(c) Subject to the provisions of subsections (e) and (f) of this section, a corporation may, by the action of its board of directors, purchase and pay for its shares, but only out of surplus and only in the following cases:

- (1) If an offer is made to purchase pro rata from all its shareholders or all of a class of shareholders.
- (2) From any shareholder shares which at the time are listed on an organized securities exchange.
- (3) From any shareholder of any class, if the board of directors shall have obtained authorization so to purchase, within a period of one year preceding the purchase, by vote of a majority of the shares of the corporation entitled to vote after full disclosure to the holders of all such shares of the specific purpose of the proposed purchase, together with a statement of the number and class of shares proposed to be purchased. Such vote shall not be required for each specific purchase, provided the total number of shares purchased from any class shall not exceed the maximum number of shares of that class authorized to be purchased.
- (4) From any shareholder in the exercise of the corporation's right to purchase the shares pursuant to restrictions upon the transfer thereof.
- (5) In connection with stabilizing operations authorized by the Securities and Exchange Commission or other regulatory authority.

(6) Repealed by Session Laws 1969, c. 751, s. 45.

(d) A corporation may acquire shares issued by a parent corporation by purchase from such parent corporation, gift, bequest, merger, consolidation, distribution of the assets of the parent or another corporation or otherwise, but not by purchase of the outstanding shares of the parent.

(e) A corporation shall not purchase or redeem its shares if at the time of or as a result of such acquisition:

- (1) There is reasonable ground for believing that the corporation would be unable to meet its obligations as they become due in the ordinary course of business, or
- (2) The liabilities of the corporation would exceed the fair present value of its assets, or
- (3) The highest aggregate liquidation preference of the shares to remain outstanding having prior or equal claims to the assets of the corporation would exceed the net assets of the corporation, or
- (4) There exists any unpaid accrued dividends or dividend credits with respect to any shares entitled to preferential dividends ahead of the shares to be purchased, but the provisions of this subdivision (4) shall not apply to purchases made as permitted in subdivisions (1), (2), (3) or (4) of subsection (b) of this section.

(f) A corporation shall not purchase its redeemable shares, otherwise than by redemption or as permitted in subdivisions (1) to (5) inclusive of subsection (b) of this section, at a time when there exists a default in the payment of accrued dividends or any dividend credit upon said shares, unless prior to such purchase notice in writing stating the intention so to purchase and the amount intended to be applied thereto is seasonably mailed to the holders of shares of the class to be purchased or unless adequate publicity of such intention and amounts is otherwise given within a time reasonably calculated to apprise the market of the proposed action.

(g) Unless steps are taken to consummate a reduction of capital as provided in G.S. 55-48, the acquisition of treasury shares shall not be deemed to effect a reduction of stated capital, whether or not the said shares are purportedly kept as treasury shares or are purportedly retired or canceled by the corporation.

(h) Redemption of shares by a corporation may be made either pro rata or by lot as provided in the charter or in resolutions adopted in conformity with G.S. 55-42, as the case may be, or, in the absence of such provision, pro rata or by lot as the board of directors may determine.

(i) Treasury shares shall not carry voting or dividend rights, except rights in share dividends paid pursuant to G.S. 55-51.

(j) This section shall apply also to corporations not formed under this Chapter, subject to such further restrictions on the purchase or redemption of shares as may be contained in special statutory provisions applicable to such corporations. (1955, c. 1371, s. 1; 1957, c. 1039; 1959, c. 1316, s. 19; 1963, c. 666; 1967, c. 1163; 1969, c. 751, ss. 23-27, 45; 1973, c. 1067.)

Legal Periodicals. — For article discussing this section, see 34 N.C.L. Rev. 432 (1956).

CASE NOTES

Law Prior to Enactment of Section. — Even prior to this section a corporation, unless restrained by some provision of its organic law, could purchase its own stock from holders thereof, and the latter were entitled to all rights

of other creditors of the corporation for the protection and enforcement of their demand for payment. *Blalock v. Kernersville Mfg. Co.*, 110 N.C. 99, 14 S.E. 501 (1892).

ARTICLE 6.

*Shareholders.***§ 55-53. Liability of shareholders arising from acquisition of shares.**

- (a) As used in this section, the term "watered shares" means shares which:
- (1) Were issued for money at less than their par value in contravention of G.S. 55-46(c); or
 - (2) Were issued, with or without par value, for a consideration other than money to a person who influenced the corporation to enter the said consideration on its books at an overvaluation, unless the value so entered is conclusive under the provisions of G.S. 55-46(f); or
 - (3) Were issued, with or without par value, for property to a person who held such property as constructive trustee for the corporation and who in transferring said property to the corporation received therefor a greater number of shares than his fiduciary duties permitted; or
 - (4) Were issued, with or without par value, for an amount of consideration which, after giving full recognition to the freedom of business judgment exercised in good faith, substantially and unfairly diluted the holdings of other shareholders and were issued to a person who had knowledge that the directors of the corporation were thereby violating their fiduciary duties to the corporation or to its shareholders. As used in this paragraph shareholders include, but are not limited to, those persons who purchase shares from the corporation or from its promoters in accordance with a plan already entertained by the promoters and who so purchase without adequate disclosure to them that their shares are diluted by the lesser amount of consideration received by the corporation for shares previously issued to promoters.
- (b) Every original holder of watered shares shall be subject to:
- (1) Liability to the corporation for the excess of the par value of said shares over the price paid for their issuance or, as the case may be, for the amount of overvaluation of the consideration entered upon its books, unless the valuation so entered is conclusive under the provisions of G.S. 55-46(f), over and above the maximum valuation that could in good faith have been fixed therefor; but this liability exists
 - a. Only if there is reasonable ground to believe that creditors or shareholders may have relied on such excess or overvaluation and
 - b. Only to the extent necessary to pay the claims of such creditors or adjust the equities of such shareholders, or
 - (2) Cancellation, in an action by the corporation, of such a number of shares as shall cure the dilution or breach of fiduciary duty which made the said shares watered shares; and if cancellation is impossible on the ground that such holder no longer retains the said number of shares, he shall be liable for such an amount in money as will fairly redress the injury to other shareholders occasioned by the said dilution or breach of fiduciary duty.
- (c) The remedies in subsection (b) of this section are cumulative, but any money recovery had thereunder shall be deemed to be additional consideration paid for the shares in question.
- (d) In any action by the corporation to enforce rights under subsection (b) of this section, the relief granted may include orders for the distribution of any recovery by the corporation to such creditors, shareholders, or former shareholders, as may have been damaged by the transaction upon which the action is based.

(e) Except in the case of watered shares, shareholders shall be subject to no assessment or liability thereon other than that arising from the unpaid balance, if any, of the agreed consideration, even if all the shares are owned by one person.

(f) Every original holder of watered shares or of shares not fully paid as agreed shall continue liable thereon to the corporation notwithstanding any transfer of such shares. A transferee of such shares shall not be liable thereon if he acquired them in good faith without knowledge or notice that they were watered shares or shares not fully paid as agreed or if he acquired them from a transferor similarly free from liability. The burden of proof that the transferee did not so acquire the shares shall be upon the adverse party. No prior holder of such shares can improve his position by taking from a later holder who is free from liability.

(g) No pledgees or other holder of shares as collateral security and no executor, administrator, conservator, guardian, trustee, receiver or other fiduciary shall be personally liable as a holder of or subscriber for shares of a corporation except to the extent that the record of shares issued or subscribed in his name without indication of representative capacity may have induced reliance upon his personal responsibility with respect to watered or unpaid shares, but the estate or funds in the hands of such fiduciary shall be liable, as equity may require. Nothing herein shall relieve a fiduciary from liability for breach of trust.

(h) Nothing in this section shall limit any liability that a shareholder may incur on general principles of law or equity arising from the creation or maintenance of an inadequately capitalized incorporated enterprise or other abuse of the privilege of achieving limited liability by incorporation. (1893, c. 471; 1901, c. 2, s. 22; Rev., s. 1162; C.S., s. 1160; G.S., s. 55-65; 1955, c. 1371, s. 1; 1969, c. 751, s. 28.)

Legal Periodicals. — For note on close corporations and personal liability from execution

of shareholder agreements, see 16 Wake Forest L. Rev. 975 (1980).

CASE NOTES

Editor's Note. — The cases below were decided under former law.

Stockholders of an insolvent corporation are liable pro rata for their unpaid subscriptions to an amount necessary to liquidate the corporate debts. *McIver v. Young Hdwe. Co.*, 144 N.C. 478, 57 S.E. 169 (1907); *Whitlock v. Alexander*, 160 N.C. 465, 76 S.E. 538 (1912); *Claypoole v. McIntosh*, 182 N.C. 109, 108 S.E. 433 (1921).

Unpaid Balances to Be Collected. — The capital stock, paid or unpaid, of a corporation being a trust fund for the benefit of creditors, it is the duty of the courts, at the suit of creditors, to require unpaid subscriptions to be collected at least to the extent necessary to pay the unpaid debts of the corporation. *Wilson Cotton Mills v. Randleman Cotton Mills*, 115 N.C. 475, 20 S.E. 770 (1894).

And Used to Settle Outstanding Claims. — In case of insolvency any unpaid balance may, by proper proceedings, be made available to the extent required for the settlement of outstanding claims. *Whitlock v. Alexander*, 160

N.C. 465, 76 S.E. 538 (1912).

Action by Corporation to Recover Amount Spent to Purchase Stock from Shareholders. — See *Park Terrace, Inc. v. Burge*, 249 N.C. 308, 106 S.E.2d 478 (1959), discussing right of creditors to require payment of purchase price under former § 55-65.

Agreement for Release Ineffective against Creditors. — No agreement or arrangement between a corporation and its stockholders, whereby the latter are to be released from indebtedness on their subscriptions, will be valid or of any force as against creditors. *Marshall Foundry Co. v. Killian*, 99 N.C. 501, 6 S.E. 680 (1888); *Heggie v. People's Bldg. & Loan Ass'n*, 107 N.C. 581, 12 S.E. 275 (1890). See also *Gilmore v. Smathers*, 167 N.C. 440, 83 S.E. 823 (1914).

Suspension of Corporate Enterprise Does Not Excuse Subscriber. — The mere fact that a proposed corporate enterprise has been suspended affords a subscriber to the capital stock no excuse for not paying his subscription according to his agreement. *Raleigh Imp.*

Co. v. Andrews, 176 N.C. 280, 96 S.E. 1032 (1918), *aff'd*, 178 N.C. 328, 100 S.E. 514 (1919).

No Defense that Corporation Not Legally Organized. — Where a person has agreed to become a stockholder in a corporation and has enjoyed the benefits and privileges of membership, he cannot, in a suit by the corporation to recover his unpaid subscription, set up as a defense that the corporation was not legally organized. *Tar River Nav. Co. v. Neal*, 10 N.C. 520 (1825); *Elizabeth City Academy v. Lindsey*, 28 N.C. 476 (1846); *Wilmington, C.R.R. v.*

Thompson, 52 N.C. 387 (1860); *Marshall Foundry Co. v. Killian*, 99 N.C. 501, 6 S.E. 680 (1888); *Wadesboro Cotton Mills Co. v. Burns*, 114 N.C. 353, 19 S.E. 238 (1894).

Setoffs Against Unpaid Subscriptions. — In a receiver's action to collect unpaid stock subscriptions, a subscriber cannot set off a debt due him by the corporation. Nor can he credit himself with amounts he paid on another subscription. *Vaughan-Robertson Drug Co. v. Grimes-Mills Drug Co.*, 173 N.C. 502, 92 S.E. 376 (1917).

§ 55-54. Liability of shareholders for receiving unlawful payments.

Any shareholder who receives any redemptive or purchase price upon the redemption or purchase by a corporation of its shares or who receives any dividend or other withdrawal or distribution from the corporation, either at a time when the corporation is or thereby will be rendered unable to meet its obligations as they mature in the ordinary course of business, or when the shareholder has knowledge that such receipt diminishes assets of the corporation contrary to the provisions of this Chapter, shall be liable to the corporation for the amount so received, including the amount of any obligation to the corporation thereby released, but this liability is subject to the same limitation as to time and amount as is contained in subsections (d) and (m) of G.S. 55-32 with respect to the liability of directors. Any number of shareholders may be sued in the same action. (1955, c. 1371, s. 1.)

CASE NOTES

Cited in *J.G. Dudley Co. v. Commissioner*, 298 F.2d 750 (4th Cir. 1962).

§ 55-55. Shareholders' derivative actions.

(a) An action may be brought in this State in the right of any domestic or foreign corporation by a shareholder or holder of a beneficial interest in shares of such corporation; provided that the plaintiff or plaintiffs must allege, and it must appear, that each plaintiff was a shareholder or holder of a beneficial interest in such shares at the time of the transaction of which he complains or that his shares or beneficial interest in such shares devolved upon him by operation of law from a person who was a shareholder or holder of a beneficial interest in such shares at such time.

(b) The complaint shall allege with particularity the efforts, if any, made by the plaintiff to obtain the action he desires from the directors or comparable authority and the reasons for his failure to obtain the action or for not making the effort.

(c) Such action shall not be discontinued, dismissed, compromised or settled without the approval of the court. If the court shall determine that the interest of the shareholders or any class or classes thereof, or of the creditors of the corporation, will be substantially affected by such discontinuance, dismissal, compromise or settlement, the court, in its discretion, may direct that notice, by publication or otherwise, shall be given to such shareholders or creditors whose interests it determines will be so affected. If notice is so directed to be given, the court may determine which one or more of the parties to the action

shall bear the expense of giving the same, in such amount as the court shall determine and find to be reasonable in the circumstances, and the amount of such expense shall be awarded as costs of the action.

(d) If the action on behalf of the corporation is successful, in whole or part, whether by means of a compromise and settlement or by a judgment, the court may award the plaintiff the reasonable expenses of maintaining the action, including reasonable attorneys' fees, and shall direct the plaintiff to account to the corporation for the remainder of any proceeds of the action.

(e) In any such action the court, upon final judgment and a finding that the action was brought without reasonable cause, may require the plaintiff or plaintiffs to pay to the defendant or defendants the reasonable expenses, including attorneys' fees, incurred by them in the defense of the action. (1973, c. 469, s. 12.)

CASE NOTES

Demand for Action by Directors as Pre-requisite. — Subsection (b) of this section codifies the prior case law of this and other jurisdictions that in order for an individual as a shareholder to bring suit against the directors of a corporation for breach of their duties to the corporation, he must show that he has exhausted his intra-corporate remedies by making demand upon the board to do that which he seeks to have done. *Swenson v. Thibaut*, 39 N.C. App. 77, 250 S.E.2d 279 (1978), cert. denied and appeal dismissed, 296 N.C. 740, 254 S.E.2d 181, 182, 183 (1979).

When Demand upon Directors Not Required. — One equitable exception to the general rule embodied by subsection (b) of this section occurs where the directors who are in control of the corporation are the same ones (or under the control of the same ones) as were initially responsible for the breaches of duty complained of, the demand of a shareholder upon directors to sue themselves or their principals would be futile, and as such is not required as a prerequisite for the maintenance of the action. *Swenson v. Thibaut*, 39 N.C. App. 77, 250 S.E.2d 279 (1978), cert. denied and appeal dismissed, 296 N.C. 740, 254 S.E.2d 181, 182, 183 (1979).

Pleading of Damages and Defenses Thereto. — The pleading of the damages is an issue which is central to the merits of a derivative action and was not an area in which the corporation had standing to assert a defense. *Swenson v. Thibaut*, 39 N.C. App. 77, 250 S.E.2d 279 (1978), cert. denied and appeal dismissed, 296 N.C. 740, 254 S.E.2d 181, 182, 183 (1979).

Business Judgment Rule. — The business judgment rule, stated simply, provides that when a corporation's decision not to assert a claim represents a good faith business judgment by its directors, a shareholder will not be permitted to substitute his judgment for that of the company's management by asserting the

claim in a derivative action. *Swenson v. Thibaut*, 39 N.C. App. 77, 250 S.E.2d 279 (1978), cert. denied and appeal dismissed, 296 N.C. 740, 254 S.E.2d 181, 182, 183 (1979).

Business Judgment Defense Involves Question of Good Faith. — Where the business judgment question is presented to a court as a ground for dismissal, the sole issue for determination is whether the decision was made in good faith. *Swenson v. Thibaut*, 39 N.C. App. 77, 250 S.E.2d 279 (1978), cert. denied and appeal dismissed, 296 N.C. 740, 254 S.E.2d 181, 182, 183 (1979).

Corporation as Defendant Where Interest Adverse to Plaintiffs. — In some situations, the corporation in whose interest the derivative action is purportedly brought will have interests adverse to those of the nominal plaintiffs bringing the action derivatively, and will of necessity be more than a nominal defendant. Such situations would include an action to enjoin the performance of a contract by the corporation, to appoint a receiver, to interfere with a corporate reorganization or to interfere with internal management where there is no allegation of fraud or bad faith. *Swenson v. Thibaut*, 39 N.C. App. 77, 250 S.E.2d 279 (1978), cert. denied and appeal dismissed, 296 N.C. 740, 254 S.E.2d 181, 182, 183 (1979).

Corporation's Right to Defend Generally. — A corporation is not powerless in all cases and in all circumstances to resist a derivative action. *Swenson v. Thibaut*, 39 N.C. App. 77, 250 S.E.2d 279 (1978), cert. denied and appeal dismissed, 296 N.C. 740, 254 S.E.2d 181, 182, 183 (1979).

When Defense of "Business Judgment" Available to Corporation. — The defense of business judgment is not available to the corporation in a derivative action where a majority of its directors are implicated in the allegations of the suit, as it is a defense on the merits which may properly be interposed only by the directors and management of the corporation,

unless the corporation is a real defendant as to some meritorious issue in the suit. *Swenson v. Thibaut*, 39 N.C. App. 77, 250 S.E.2d 279 (1978), cert. denied and appeal dismissed, 296 N.C. 740, 254 S.E.2d 181, 182, 183 (1979).

Defenses Not on Merits Available to Corporation. — Other defenses, such as matters of personal jurisdiction, venue and subject matter jurisdiction (which question may arise in the context of alleged existence of prior pending actions involving matters identical to those complained of in the derivative suit) could be asserted by both corporations and individual defendants where appropriate, as they are not defenses on the merits of the derivative claim. *Swenson v. Thibaut*, 39 N.C. App. 77, 250 S.E.2d 279 (1978), cert. denied and appeal dismissed, 296 N.C. 740, 254 S.E.2d 181, 182, 183 (1979).

Additionally, certain defenses which are properly asserted before trial on the merits of the derivative action are peculiar to the corporation alone, and may be properly raised only by the corporate nominal defendant who, for purposes of those matters, ceases to be a nominal defendant and becomes an actual party defendant. These defenses would include the lack of standing of the plaintiffs to sue derivatively for reasons of insufficient representation of shareholders and a failure on plaintiffs' part to make a demand upon the board of directors. *Swenson v. Thibaut*, 39 N.C. App. 77, 250 S.E.2d 279 (1978), cert. denied and appeal dismissed, 296 N.C. 740, 254 S.E.2d 181, 182, 183 (1979).

Limits on Corporation's Right to Defend. — In an action, brought by a minority share-

holder derivatively in the name and right of a corporation, to enforce rights or to seek redress accruing to the corporation, that corporation will be deemed for purposes of the litigation to be aligned as a party plaintiff (except to the extent that the corporation is an actual defendant as to an issue in the action) although for purposes of form it is designated as a nominal defendant. Accordingly, the corporation may not defend itself against the derivative action on the merits and must limit its defenses, if any, to the pre-trial matters proper to it. Where a corporation seeks to extend its defenses beyond those areas in which it may properly conduct them, dismissal will lie against it. *Swenson v. Thibaut*, 39 N.C. App. 77, 250 S.E.2d 279 (1978), cert. denied and appeal dismissed, 296 N.C. 740, 254 S.E.2d 181, 182, 183 (1979).

When Order Not Void for Lack of Notice to Shareholders. — In an action challenging the appointment of operating receivers for a corporation there was no merit to defendants' contention that the initial order of the trial court appointing the receivers was void because certain shareholders were not given notice of the proceedings and were thereby denied their due process rights to notice prior to a court proceeding, the outcome of which would affect their property interests, since there is no requirement in the statutes, either in the provisions governing the appointment of receivers or in the provisions governing derivative shareholder suits, that notice be given to persons who are not parties to the action. *Lowder v. All Star Mills, Inc.*, 301 N.C. 561, 273 S.E.2d 247 (1981).

§ 55-56. Preemptive rights.

(a) The charter may enlarge, limit or deny what would otherwise be the preemptive rights of shareholders.

(b) Except as otherwise provided in the charter or in this section, the holders of shares of any class, except shares which are limited as to dividends and liquidation rights, shall have the right, in case of the proposed sale by the corporation for cash of additional shares of the same class as those held by them, to purchase the additional shares in proportion to their then respective holdings at a price substantially no less favorable than the price at which such shares are to be offered to others. Such holders shall have a similar right in case of the granting by the corporation of any option to purchase its shares of the class held by such holders or in case of a proposed sale by the corporation for cash of any securities convertible into or carrying an option to purchase shares of the class held by such holders. Such right exists irrespective of whether the shares to be sold by the corporation are shares authorized in the articles of incorporation as originally filed or are treasury shares or other shares. Nothing herein is meant to give a shareholder the preemptive right to buy shares at a price determined by their par value.

(c) Unless otherwise stated in the charter, there shall be no preemptive rights to acquire:

- (1) Shares issued within one year or to be issued pursuant to subscriptions accepted within one year, after the filing of the articles of incorporation, or
 - (2) Shares issued or to be issued for considerations, other than money, deemed by the board of directors in good faith to be advantageous to the corporation's business, or
 - (3) Shares released from preemptive rights by vote of two thirds of the shares entitled to such preemptive rights, or
 - (4) Shares sold or agreed to be sold to employees or rights or options for shares granted to employees as provided in G.S. 55-45, provided a plan for such sales or options is approved by the affirmative vote of a majority of the outstanding shares entitled to vote, or
 - (5) Shares issued or to be issued as a share dividend, or
 - (6) Shares issued or to be issued to satisfy conversion rights or option rights theretofore granted by the corporation, or
 - (7) Shares with respect to which the notice required by subsection (g) of this section has been given but which have not been purchased or subscribed within the prescribed time and which are thereafter sold or optioned to any other person or persons at a price no lower than and upon the other terms and conditions stated in such notice.
- (d) Holders of bonds, notes, debentures or other obligations convertible into shares and holders of shares convertible into shares of another class shall have no preemptive rights in shares into which they are convertible unless expressly granted in the charter or in the contract with said holders.
- (e) The issuance of shares that are not subject to preemptive rights shall not impair any remedy which any shareholder may have for a breach of fiduciary duties on the part of the board of directors with respect thereto. The remedy may include the granting of such preemptive rights or the cancellation of such a number of shares or the compulsory issuance by the corporation of such a number of shares, or the allowance of such amount of money damages as the court may order.
- (f) The issue or sale by a corporation of shares carrying voting rights does not of itself confer preemptive rights upon shareholders whose voting powers are relatively diminished thereby but the issue or sale of such shares for the purpose of creating in a group or combination of shareholders the power to elect a majority of the board of directors is a breach of fiduciary duty within subsection (e) of this section.
- (g) The holders of shares entitled to preemptive rights under the charter or under this section shall be given written or printed notice briefly describing the shares with respect to which such rights exist and the period of time (not less than 15 days) within which and the terms and conditions, including the price, upon which such rights may be exercised. Such notice shall be delivered to each such holder, either personally or by mail, not less than 20 or more than 180 days prior to the expiration of the stated period within which such rights may be exercised. If mailed, such notice shall be deemed to be delivered when deposited in the United States mail addressed to the holder at his address as it appears on the record of shareholders of the corporation, with postage thereon prepaid. (1955, c. 1371, s. 1; 1969, c. 751, ss. 29-32; 1979, c. 508, s. 2.)

CASE NOTES

Cited in *Blount v. Taft*, 295 N.C. 472, 246 S.E.2d 763 (1978).

§ 55-57. Share certificates.

(a) No certificate shall be issued for any share until such share is fully paid.

(b) Every shareholder of a corporation shall be entitled to a certificate or certificates for the fully paid shares owned by him. Each certificate shall be signed by the president or a vice-president of the corporation or a person who has been designated as the chief executive officer of the corporation, and by its treasurer, assistant treasurer, secretary or an assistant secretary, or its cashier or an assistant cashier in case of a bank, and may be sealed with the seal of the corporation or a facsimile thereof. The signatures of any such officers upon a certificate may be facsimiles or may be engraved or printed or omitted if the certificate is countersigned by a transfer agent, or registered by a registrar, other than the corporation itself or an employee of the corporation. In case any officer who has signed or whose facsimile or other signature has been placed upon such certificate shall have ceased to be such officer before such certificate is issued, it may be issued by the corporation with the same effect as if he were such officer at the date of its issue.

(c) Every share certificate issued by a corporation which is authorized to issue shares for more than one class shall state upon the face or back thereof, in full or in the form of a summary, all of the designations, preferences, limitations, and relative rights, so far as the same have at that time been fixed and determined, of the shares of each class, and of the variations therein between any series of any class, authorized to be issued; and to the extent that the same shall not at that time have been fixed and determined, such share certificate shall state the authority of the shareholders or of the board of directors, as the case may be, to fix and determine the same. In lieu of such statement, however, the certificate may state upon the face or back thereof the designation of each class of shares having preferences or special rights in the payment of dividends, in voting, upon liquidation or otherwise and such other information concerning such shares as may be desired and shall state that the corporation will upon request furnish any shareholder, without charge, information as to the number of such shares authorized and outstanding and a copy of the portions of the charter or resolutions containing the designations, preferences, limitations and relative rights of all shares and any series thereof. When so requested, the corporation shall promptly so furnish the said information and copy.

(d) Each share certificate shall also state upon the face thereof:

(1) That the corporation is organized under the laws of this State.

(2) The name of the person to whom issued.

(3) The number and class of shares, and the designation of the series, if any, which such certificate represents.

(4) The par value of each share represented by such certificate, or a statement that the shares are without par value.

(e) The board of directors may authorize the issuance of a new share certificate in place of a certificate claimed to have been lost or destroyed without requiring a bond if in the judgment of the directors the circumstances justify omission of a bond, and they shall incur no liability for taking such action in good faith. (1885, c. 265; 1901, c. 2, s. 94; Rev., ss. 1165, 1166; C.S., s. 1162; 1927, c. 173; 1949, c. 809; G.S., s. 55-67; 1955, c. 1371, s. 1; 1979, c. 91.)

Cross References. — As to replacement certificates, see § 25-8-405.

CASE NOTES

Nature of Stock Certificate. — A certificate of stock is simply a written acknowledgment by a corporation of the interest of the holder in its property and franchises. It has no value except that derived from the company issuing it, and its legal status is in the nature of a chose in action. *Person v. Board of State Tax Comm'rs*, 184 N.C. 499, 115 S.E. 336 (1922).

Evidence of Ownership of Stock. — A certificate for shares is not the stock itself, but constitutes only prima facie evidence of the ownership of that number of shares.

Misenheimer v. Alexander, 162 N.C. 226, 78 S.E. 161 (1913).

Issuance of stock certificates is unnecessary to existence of the corporation. *Powell Bros. v. McMullan Lumber Co.*, 153 N.C. 52, 68 S.E. 926 (1910).

Or to confer title to the stockholder. *Powell Bros. v. McMullan Lumber Co.*, 153 N.C. 52, 68 S.E. 926 (1910).

Cited in State ex rel. Utilities Comm'n v. United Tank Lines, 34 N.C. App. 543, 239 S.E.2d 266 (1977).

§ 55-58. Issuance of fractional share certificates or script.

A corporation may, but shall not be obligated to, issue a certificate for a fractional share, and, by action of its board of directors, may sell said fractional share in any fair and equitable manner and pay cash equal to the value of said fractional share to the person entitled thereto. In lieu of issuing a certificate for a fractional share, a corporation may issue script in registered or bearer form which shall entitle the holder to receive a certificate for a full share upon the surrender of such script aggregating a full share. A certificate for a fractional share shall, but script shall not unless otherwise provided therein, entitle the holder to exercise proportionate voting rights, to receive dividends thereon, and to participate in any of the assets of the corporation in the event of liquidation. The board of directors may cause such script to be issued subject to the express condition therein that, if not exchanged for certificates representing full shares before a specified date, the shares for which such script is exchangeable may thereupon be sold by the corporation to others, in such fair manner as may be provided therein, or may promptly be purchased by the corporation at the book value as determined upon the aforesaid date, and in either event the proceeds thereof paid to the holders of such script. (1955, c. 1371, s. 1; 1959, c. 1316, s. 20.)

Legal Periodicals. — For survey of 1979 commercial law, see 58 N.C.L. Rev. 1290 (1980).

§ 55-59. Recognition of acts of record owners of shares or other securities.

(a) Except where the registration of shares or other securities has been changed by the corporation without surrender of the appropriate instrument and assignment (but regardless of the lack of competency or capacity of the assignor), a corporation may, subject to the further provisions of this section, treat as absolute owner of shares or other securities the person in whose name the shares or other securities stand of record on its books, just as if that person had full competency, capacity and authority to exercise all rights of ownership, irrespective of

- (1) Any knowledge or notice to the contrary or
- (2) Any description indicating a representative, pledge or other fiduciary relation or any reference to any other instrument or to the rights of any other person appearing upon its records or upon the share certificate or other security.

(b) Notwithstanding the provisions of subsection (a) of this section, a corporation shall treat a person as if he were a holder of record of its shares or other securities if that person shall furnish to the corporation proof of his appointment as:

- (1) An executor under the last will of a deceased holder of record of its shares or other securities; or
- (2) An administrator or collector of the estate of such holder; or
- (3) A guardian, committee, trustee or conservator of the estate of a ward, incompetent, or missing person who is a holder of record of its shares or other securities; or
- (4) A trustee in bankruptcy of such a holder; or
- (5) A statutory or judicial receiver or liquidator of the estate or affairs of such a holder.

(c) When and as any fiduciary other than one described in subsection (b) of this section shall furnish proof satisfactory to the corporation of his authority to exercise any rights with respect to shares or other securities of the corporation which do not stand of record in his name, the corporation may treat such fiduciary as entitled to exercise such rights.

(d) When one or more fiduciaries shall claim to be entitled to the same rights with respect to the same shares or securities, the corporation may refuse to treat any of them as entitled to such rights unless and until proof, satisfactory to it, shall be furnished as to which of such fiduciaries is entitled to the rights in question.

(e) A corporation may treat as absolute owner of shares or other securities the survivor or survivors of persons to whom the same have been or may be issued with the words "as joint tenants," "as joint tenants with right of survivorship" or "as joint tenants with right of survivorship and not as tenants in common" following their names, upon the death of one or more of such persons.

(f) A corporation shall incur no liability to any person by the exercise of any privilege to which it is entitled by this section, nor shall any of its rights be thereby impaired nor shall any of its acts or any corporate meeting be thereby invalidated.

(g) The corporation shall not be obligated to inquire into the existence of, or see to the performance or observance of, any duty or obligation to a third person by a holder of record of any of its shares or other securities or by anyone who it treats, as permitted or required by this section, as the absolute owner thereof.

(h) When in accordance with any of the provisions of this section the corporation shall have treated a minor as entitled to exercise any rights of ownership in its shares or other securities, no subsequent disaffirmance or avoidance shall be effective as against the corporation.

(i) The rights, privileges and immunities afforded to the corporation in this section shall extend also to each transfer agent and to each registrar of its shares or other securities, to its voting inspectors and to all agents of the corporation concerned with the exercise of any rights by any of its shareholders or security holders.

(j) Nothing herein shall enlarge or affect the competency, authority, rights or obligations of any holder of record with respect to any other person than the corporation and its representatives described in the preceding subsection.

(k) Nothing herein shall relieve a corporation from any liability which it otherwise would have for breach by it of a contract to which it is a party or for violation of lawful provisions in its charter or bylaws or for participating in bad faith with a fiduciary in breach of trust.

(l) Nothing herein shall impair the duty of a corporation to abide by any valid judgment or decree or court order terminating or restricting the competency, capacity, authority or rights of ownership of any holder of record of shares or other securities or of a fiduciary thereof if and after a certified copy

of that judgment, decree or court order is filed with the corporation or if that judgment, decree or order is rendered in a proceeding to which the corporation is a party. (1955, c. 1371, s. 1; 1957, c. 1039.)

Cross References. — As to transfer of securities by fiduciaries, see §§ 32-14 to 32-24. ownership of corporate securities in North Carolina, see 44 N.C.L. Rev. 290 (1966); 46 N.C.L. Rev. 520 (1968).

Legal Periodicals. — For article on joint

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Cited in Blount v. Taft, 29 N.C. App. 626, 225 S.E.2d 583 (1976).

§ 55-60. Closing of transfer books and fixing record date.

(a) For the purpose of determining shareholders entitled to notice of or to vote at any meeting of shareholders or any adjournment thereof, or entitled to receive payment of any dividend, or in order to make a determination of shareholders for any other proper purpose, the board of directors of a corporation may provide that the stock transfer books shall be closed for a stated period but not to exceed, in any case, 50 days. If the stock transfer books shall be closed for the purpose of determining shareholders entitled to notice of or to vote at a meeting of shareholders, such books shall be closed for at least 10 full days immediately preceding the date of such meeting.

(b) In lieu of closing the stock transfer books, the bylaws, or in the absence of an applicable bylaw, the board of directors may fix in advance a date as the record date for any such determination of shareholders, such date in any case to be not more than 60 days and, in case of a meeting of shareholders, not less than 10 full days immediately preceding the date on which the particular action, requiring such determination of shareholders, is to be taken.

(c) If the stock transfer books are not closed and no record date is fixed for the determination of shareholders entitled to notice of or to vote at a meeting or of shareholders entitled to receive payment of a dividend, the date on which notice of the meeting is mailed or the date on which the resolution of the board of directors declaring such dividend is adopted, as the case may be, shall be the record date for such determination of shareholders.

(d) When a determination of shareholders entitled to vote at any meeting of shareholders has been made as provided in this section, such determination shall apply to any adjournment thereof regardless of its length except where the determination has been made through the closing of the stock transfer books and the stated period of closing has expired. (1955, c. 1371, s. 1; 1973, c. 469, s. 45.1.)

§ 55-61. Meetings of shareholders.

(a) Meetings of shareholders may be held at such place, either within or without this State, as may be provided in the bylaws. In the absence of any such provision, all meetings shall be held at the registered office of the corporation.

(b) An annual meeting of the shareholders shall be held at such time as may be provided in the bylaws. Failure to hold the annual meeting at the designated time shall not work a forfeiture or dissolution of the corporation or affect otherwise valid corporate acts. Upon such failure, whether from lack of quorum or otherwise, a substitute annual meeting may be called in accordance with the provisions of subsection (c) of this section and any meeting so called may be designated as the annual meeting, or the judge of the superior court of the county where the corporation has its registered office may, upon the applica-

tion of any shareholder, order a substitute meeting to be held as and for the annual meeting, and may fix the date therefor, fix the record date for determination of the shareholders entitled to vote thereat, and cause notice of the meeting to be given to said shareholders, in such manner as he may order, at the expense of the corporation. Subject to the provisions of G.S. 55-73(b), at such meeting the shares of stock there represented either in person or by proxy, shall constitute a quorum for the purpose of such meeting, notwithstanding the provisions of any other section of this Chapter or any provision of the bylaws or charter to the contrary.

(c) Special meetings of the shareholders may be called by the president or the board of directors or such other officers or persons as may be provided in the charter or the bylaws or, at the written request of the holders of not less than one tenth of all the shares entitled to vote at the meeting, by any shareholder. When the meeting is thus called by a shareholder the call shall recite that it is made pursuant to the required request, but failure so to recite shall not invalidate an otherwise valid meeting.

(d) Any matter relating to the affairs of a corporation is a proper subject for action at an annual meeting of shareholders, and unless required by some provision of this Chapter, the matter need not be specifically stated in the notice of the meeting. (1901, c. 2, ss. 46, 49, 51; Rev., ss. 1179, 1188, 1190; C.S., ss. 1168, 1169, 1176; G.S., ss. 55-105, 55-106, 55-113; 1955, c. 1371, s. 1; 1959, c. 1316, ss. 21, 22.)

Legal Periodicals. — For comment on the proxy system in the corporate electoral process, see 60 N.C.L. Rev. 145 (1981).

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Stated in *Swenson v. All Am. Assurance Co.*, 33 N.C. App. 458, 235 S.E.2d 793 (1977).

§ 55-62. Notice of shareholders' meetings.

(a) Written or printed notice stating the place, day and hour of the meeting and, in case of a special meeting, the purpose or purposes for which the meeting is called, shall be delivered not less than 10 nor more than 50 days before the date of the meeting, either personally or by mail, by or at the direction of the president, the secretary, or the officer or persons calling the meeting, to each shareholder of record entitled to vote at such meeting. If mailed, such notice shall be deemed to be delivered when deposited in the United States mail addressed to the shareholder at his address as it appears on the record of shareholders of the corporation, with postage thereon prepaid.

(b) If not less than seven days prior to the date of any forthcoming meeting of shareholders a shareholder mails to the shareholders entitled to vote at that meeting, or if not less than three days prior to said date he delivers to them personally, a written notice of his intention to bring before the meeting any specific proposal, that proposal shall be considered and acted upon at that meeting. The officers of the corporation shall, under the penalties of G.S. 55-38, make immediately available to a shareholder seeking to avail himself of this subsection who so requests the voting list prescribed by G.S. 55-64.

(c) When a meeting is adjourned for 30 days or more, notice of the adjourned meeting shall be given as in the case of an original meeting. When a meeting is adjourned for less than 30 days in any one adjournment it is not necessary, unless the bylaws provide otherwise, to give any notice of the time and place of the adjourned meeting or of the business to be transacted thereat other than

by announcement at the meeting at which the adjournment is taken. (1955, c. 1371, s. 1.)

§ 55-63. Irregular meetings; action without meetings.

(a) The transactions of any meeting of shareholders, however called and with whatever notice, if any, are as valid as though had at a meeting duly held after regular call and notice, if:

- (1) All the shareholders entitled to vote are present in person or by proxy and no objection to holding the meeting is made by any shareholder, or if
- (2) A quorum is present either in person or by proxy and no objection to holding the meeting is made by anyone so present, and if, either before or after the meeting, each of the persons entitled to vote, not present in person or by proxy, signs a written waiver of notice, or a consent to the holding of the meeting, or an approval of the action taken as shown by the minutes thereof. All such waivers, consents, or approvals shall be filed with the corporate records or made a part of the minutes of the meeting.

(b) The absence from the minutes of any indication that a shareholder objected to holding the meeting shall prima facie establish that no such objection was made.

(c) Any action which, under any provision of this Chapter, is required or permitted to be taken at a meeting of the shareholders, may be taken without a meeting if consent in writing, setting forth the action so taken, shall be signed by all of the persons who would be entitled to vote upon such action at a meeting and filed with the secretary of the corporation as part of the corporate records, whether done before or after the action so taken. Such consent shall have the same force and effect as a unanimous vote of shareholders, and may be stated as such in any certificate or document filed with the Secretary of State under this Chapter. (1955, c. 1371, s. 1; 1969, c. 751, s. 33.)

Legal Periodicals. — For article discussing this section, see 34 N.C.L. Rev. 432 (1956).

For note on close corporations and personal

liability from execution of shareholder agreements, see 16 Wake Forest L. Rev. 975 (1980).

§ 55-64. Voting list.

(a) The officer or agent having charge of the record of shareholders of a corporation shall make, at least 10 days before each meeting of shareholders, a complete list of the shareholders entitled to vote at such meeting or any adjournment thereof, arranged in alphabetical order, with the address of and the number of shares held by each, which list, for a period of 10 days prior to such meeting, shall be kept on file at the registered office of the corporation and shall be subject to inspection by any shareholder at any time during usual business hours. Such list shall also be produced and kept open at the time and place of the meeting and shall be subject to the inspection of any shareholder during the whole time of the meeting. The record of shareholders required to be kept by subdivision (a)(3) of G.S. 55-37 shall be prima facie evidence as to who are the shareholders entitled to examine such list or the record of shareholders or to vote at any meeting of shareholders.

(b) Failure to comply with the requirements of this section shall not affect the validity of any action taken at such meeting.

(c) An officer or agent having charge of the record of shareholders who shall fail to prepare the list of shareholders, or keep the same on file for a period of 10 days, or produce and keep it open for inspection at the meeting, as provided

in this section, shall be liable to any shareholder suffering damage on account of such failure, to the extent of such damage, provided such shareholder has made written request therefor at least 20 days prior to such meeting.

(d) Notwithstanding the foregoing provisions of this section, it shall not be necessary to prepare or produce a list of shareholders in any case where the record of shareholders actually presented readily shows, in alphabetical order or by alphabetical index, and by classes or series if such there be, the names of the shareholders entitled to vote, with their address and the amount of their holdings. (1955, c. 1371, s. 1.)

Cross References. — As to mandamus to require disclosure of names, addresses and holdings of shareholders, see note to § 55-37.

CASE NOTES

Section Supplements § 55-37. — Section 55-37(a)(3) is supplemented by this section. *White v. Smith*, 256 N.C. 218, 123 S.E.2d 628 (1962).

Application to Building and Loan Associations. — This section and § 55-37(a)(3) apply to building and loan associations. *White v. Smith*, 256 N.C. 218, 123 S.E.2d 628 (1962).

§ 55-65. Quorum of shareholders.

(a) Unless otherwise provided in this Chapter or in the charter or in a bylaw adopted by the shareholders, a majority of the shares entitled to vote, represented in person or by proxy, shall constitute a quorum at a meeting of shareholders, but in no event shall a quorum consist of less than one third of the outstanding shares entitled to vote.

(b) Shares shall not be counted to make up a quorum for a meeting if voting of them at the meeting has been enjoined or for any reason they cannot be lawfully voted.

(c) The shareholders at a meeting at which a quorum is present may continue to do business until adjournment, notwithstanding the withdrawal of enough shareholders to leave less than a quorum.

(d) In the absence of a quorum at the opening of any meeting of shareholders, such meeting may be adjourned from time to time by the vote of a majority of the shares voting on the motion to adjourn, but no other business may be transacted until and unless a quorum is present. (1901, c. 2, s. 39; Rev., s. 1182; C.S., s. 1175; 1927, c. 138; G.S., s. 55-112; 1955, c. 1371, s. 1; 1973, c. 469, s. 21.)

CASE NOTES

Effect of Illegal Motion of Adjournment on Election of Officers. — When a motion to adjourn a stockholders' meeting has been carried, and a sufficient number have withdrawn to reduce the number of those present below a majority of all the stock issued and outstanding, an election of officers cannot be

lawfully held thereafter at that meeting, though the adjournment was carried by an illegal vote. *Bridgers v. Staton*, 150 N.C. 216, 63 S.E. 892 (1909).

Cited in *Blount v. Taft*, 295 N.C. 472, 246 S.E.2d 763 (1978).

§ 55-66. Votes required.

(a) A majority of the shares voted at a meeting of shareholders, duly held and at which a quorum is present, shall be sufficient to take or authorize action upon any matter which may properly come before the meeting, unless more than a majority is required by this Chapter or by the charter or a bylaw adopted by the shareholders.

(b) Except where other provisions of this Chapter expressly make this subsection inapplicable, any corporation may by its charter or a bylaw adopted by its shareholders require for any purpose the concurrence of a greater proportion of the votes of any class or classes of shares than required by this Chapter for such purpose.

(c) Any provision in the charter or bylaws prescribing the vote required for any purpose as permitted by this section may not itself be amended by a vote less than the vote therein prescribed. (1955, c. 1371, s. 1; 1973, c. 469, s. 22.)

Cross References. — As to shareholders' agreements, see § 55-73.

CASE NOTES

Applied in *Blount v. Taft*, 29 N.C. App. 626, 225 S.E.2d 583 (1976).

Cited in *Blount v. Taft*, 295 N.C. 472, 246 S.E.2d 763 (1978).

§ 55-67. Voting of shares.

(a) Each outstanding share, regardless of class, shall be entitled to one vote on each matter submitted to a vote at a meeting of shareholders, except as otherwise lawfully provided in the charter and except as otherwise prescribed by subsection (b) of this section. Except as otherwise stated in the charter or in the subscription agreement, shares shall be entitled to full vote notwithstanding that they have not been fully paid. No shares shall be voted upon which an installment of the purchase price due to the corporation is past due and unpaid.

(b) Except as otherwise provided in this subsection, shares of its own stock owned by a corporation, directly or indirectly, through a subsidiary corporation or otherwise, shall not be voted and shall not be counted in determining the total number of shares entitled to vote.

Notwithstanding any other provisions in this Chapter, shares of its own stock held by a corporation or by its subsidiary corporation in a fiduciary capacity shall not be voted in the election of directors and shall not be counted in determining the total number of shares entitled to vote in the election of directors if such corporation is the sole fiduciary, unless the instrument or court order establishing the fiduciary relationship provides that such shares may be voted as directed by some person other than the fiduciary and unless such person actually directs how such shares shall be voted; but if such corporation is not the sole fiduciary, then such shares may be voted in the election of directors by the other fiduciary or fiduciaries in accordance with the provisions of G.S. 55-69, and such shares shall be counted in determining the total number of shares entitled to vote in the election of directors. In all other matters, shares of its own stock held directly or indirectly by a corporation or through a subsidiary thereof as sole fiduciary or as a cofiduciary may be voted by the registered owner or owners, unless the instrument creating the fiduciary relationship provides otherwise.

(c) Except where some inconsistent agreement exists for choosing directors, valid under the provisions of G.S. 55-73, directors shall be elected by a plurality

of the votes cast and at each election for directors every shareholder entitled to vote at such election shall have the right to vote, in person or by proxy, the number of shares standing of record in his name for as many persons as there are directors to be elected and for whose election he has a right to vote, or to cumulate his votes by giving one candidate as many votes as the number of such directors multiplied by the number of his shares shall equal, or by distributing such votes on the same principle among any number of such candidates. This right of cumulative voting shall not be exercised unless some shareholder or proxy holder announces in open meeting, before the voting for directors starts, his intention so to vote cumulatively; and if such announcement is made, the chair shall declare that all shares entitled to vote have the right to vote cumulatively and shall announce the number of shares present in person and by proxy, and shall thereupon grant a recess of not less than one hour nor more than four hours, as he shall determine, or of such other period of time as is unanimously then agreed upon. Stockholders in any corporation now in existence under a charter which does not grant the right of cumulative voting may not exercise this right of cumulative voting when at the time of the election the stock transfer book of such corporation discloses, or it otherwise appears, that there is no stockholder who owns or controls more than one fourth of the voting stock of such corporation. Shares represented at a meeting by revocable proxy relating to that meeting or adjourned meetings thereof shall not be deemed shares "controlled" within the meaning of this subsection. (Rev., ss. 1183, 1184; 1907, c. 457, s. 1; 1909, c. 827, s. 1; C.S., s. 1173; 1945, c. 635; G.S., s. 55-110; 1951, c. 265, s. 2; 1953, c. 722; 1955, c. 1371, s. 1; 1959, c. 768; c. 1316, s. 23; 1963, c. 1065; 1969, c. 751, ss. 34, 35.)

CASE NOTES

When Cumulative Voting Applies. — See *Bridgers v. Staton*, 150 N.C. 216, 63 S.E. 892 (1909).

Agreement Depriving Stockholders of

Right to Vote. — See *Harvey v. Linville Imp. Co.*, 118 N.C. 693, 24 S.E. 489 (1896); *Sheppard v. Rockingham Power Co.*, 150 N.C. 776, 64 S.E. 894 (1909).

§ 55-68. Proxies.

(a) Shares may be voted either in person or by one or more agents authorized by a written proxy executed by the shareholder or by his duly authorized attorney-in-fact. A telegram, cablegram, wireless message or photogram appearing to have been transmitted by a shareholder, or a photographic, photostatic or equivalent reproduction of a writing appointing one or more agents shall be deemed a written proxy within the meaning of this section.

(b) A proxy is not valid after the expiration of 11 months from the date of its execution unless the person executing it specifies therein the length of time for which it is to continue in force, or limits its use to a particular meeting, but no proxy, whether or not designated as irrevocable as permitted by subsection (g) of this section, shall be valid after 10 years from the date of its execution, unless renewed or extended at any time before its expiration for not more than 10 years from the date of such renewal or extension.

(c) Any proxy duly executed is not revoked, and continues in full force and effect, until an instrument revoking it, or a duly executed proxy bearing a later date, is filed with the secretary of the corporation. A proxy is not revoked by the death or incapacity of the maker unless, before the vote is counted or the authority is exercised, written notice of the death or incapacity is given to the corporation. Notwithstanding that a valid proxy is outstanding the powers of the proxy holder are suspended, except in the case of a valid proxy which is

designated as irrevocable as permitted by subsection (g) of this section, if the person executing the proxy is present at the meeting and elects to vote in person.

(d) If a proxy for the same shares confers authority upon two or more persons and does not otherwise provide, a majority of them present at the meeting, or if only one is present then that one, may exercise all the powers conferred by the proxy; but if the proxy holders present at the meeting are divided as to the right and manner of voting in any particular case and there is no majority, the voting of said shares shall be prorated.

(e) Unless a proxy otherwise provides, any proxy holder may appoint in writing a substitute to act in his place.

(f) A proxy shall be irrevocable only when it clearly indicates that it is to be irrevocable and is held by any of the following or by a nominee of any of the following:

- (1) A pledgee of the shares which are the subject of the proxy; or
- (2) A person who has purchased or contracted to purchase the shares which are the subject of the proxy; or
- (3) A creditor or creditors of the corporation who extend or continue credit to the corporation in consideration of a proxy, if such proxy specifically states that it was given in consideration of such extension or continuation of credit, and sets forth the amount of, and the name of the person extending or continuing, credit; or
- (4) A person who has contracted to perform services for the corporation under a contract which requires a proxy, if the proxy states that it was given in consideration of the contract, the name of the person, and the period of the contract; or
- (5) A person, including an arbitrator, designated by or under a shareholders' agreement permitted by G.S. 55-73.

Any such proxy shall become revocable after the pledge is redeemed, or the contract of purchase has been performed and the purchaser has become a shareholder of record, or the debt of the corporation is paid, or the period of the contract has been terminated, or the agreement permitted by G.S. 55-73 has terminated.

(g) A proxy may be revoked, notwithstanding a provision making it irrevocable, by a purchaser of shares without knowledge of the existence of such provision, unless notice of the proxy and of its irrevocability plainly appears on the face or back of the certificate representing such shares.

(h) The foregoing provisions shall be applicable to proxies given by the holders of a corporation's bonds, debentures or other obligations where a right to vote is conferred upon such holders by the charter as permitted by G.S. 55-44.1. (1955, c. 1371, s. 1; 1959, c. 1316, s. 24; 1973, c. 469, ss. 23-25.)

CASE NOTES

Assignment Reserving Possession and Right to Dividends. — A written agreement assigning stock in a corporation with authority to vote, reserving to the assignors who retain possession the right to all dividends, amounts

only to a proxy. *Bridgers v. Staton*, 150 N.C. 216, 63 S.E. 892 (1909).

Applied in *Stein v. Capital Outdoor Adv., Inc.*, 273 N.C. 77, 159 S.E.2d 351 (1968).

§ 55-69. Voting by corporations, pledgees, life tenants, fiduciaries and co-owners.

(a) The president, any vice-president, the secretary or the treasurer of a domestic corporation holding shares of another corporation, domestic or foreign, and any such officer or the cashier or any trust officer of a banking or trust corporation holding shares of another corporation, domestic or foreign, and any like officer of a foreign corporation holding shares of a domestic corporation, shall be deemed by the corporation issuing such shares to have authority to vote such shares and to execute proxies and written waivers and consents in relation thereto, whether such shares are held in a fiduciary capacity or otherwise, unless before a vote is taken or a waiver or consent is acted upon it is made to appear by a certified copy of the bylaws or resolution of the board of directors or executive committee of the corporation holding such shares that such authority does not exist or is vested in some other officer or person. In the absence of such certification or of an instrument executed in accordance with G.S. 55-36(a), a person executing any such proxies, waivers or consents or presenting himself at a meeting as one of such officers of a domestic or foreign corporation shall for the purposes of this section be prima facie deemed to be duly elected, qualified and acting as such officer and to be fully authorized, and in case of conflicting representation, the corporate shareholder shall be deemed represented by its senior officer, in the order first stated in this section.

(b) A shareholder whose shares are pledged shall be entitled to vote such shares until the shares have been transferred into the name of the pledgee, and thereafter the pledgee shall be entitled to vote the shares so long as they stand of record in his name.

(c) If shares stand of record in the name of a person as life tenant, the corporation may treat such person as entitled to vote or represent such shares as if he were absolute owner, unless the record itself shows that he is not entitled to vote or unless G.S. 55-59(1) is applicable.

(d) A fiduciary may, in person or by proxy, vote and execute waivers, consents or objections in respect of shares standing of record in his name, and a proxy executed by a fiduciary may confer general or discretionary power.

(e) Any fiduciary described in G.S. 55-59(b), upon satisfactory proof of his appointment and qualification, and any other fiduciary upon satisfactory proof to the corporation of his actual authority to vote, may vote or execute waivers, consents or objections with respect to any shares of a corporation even if the shares stand of record in the name of the person for whom he is such fiduciary, but nothing herein is meant to curtail the privileges and immunities to which a corporation is entitled under G.S. 55-59.

(f) If shares stand of record in the names of two or more persons, whether fiduciaries, joint tenants, tenants in common, tenants in partnership, or otherwise, or if two or more persons shall have the same fiduciary relationship respecting the same shares, then unless the instrument or order appointing them or creating the tenancy otherwise directs and it or a copy thereof is filed with the secretary of the corporation, their acts with respect to voting shall have the following effect:

- (1) If only one votes, in person or by proxy, his act binds all;
- (2) If more than one vote, in person or by proxy, the act of the majority so voting binds all;
- (3) If more than one vote in person or by proxy but the vote is evenly split on any particular matter, each faction is entitled to vote the shares in question proportionally.

If the instrument so filed shows that any such tenancy is held in unequal interests, a majority or even-split for the purpose of this subsection shall be a majority or even-split in interest.

(g) The principle of the preceding subsection shall apply, insofar as possible, to execution of proxies, waivers, consents or objections and for the purpose of ascertaining the presence of a quorum. (1901, c. 2, ss. 42, 43; c. 474, ss. 1, 2; Rev., ss. 1185, 1186, 1187; C.S., s. 1174; G.S., s. 55-111; 1955, c. 1371, s. 1; 1959, c. 1316, s. 36.)

CASE NOTES

When Trustee May Vote. — See Haywood v. Wright, 152 N.C. 421, 67 S.E. 982 (1910).

Vote of One Trustee Is Act of All Trustees. — The vote of one trustee ordinarily

is the act of all the trustees where the trust owns shares of corporate stock. *Fulk & Needham, Inc. v. United States*, 411 F.2d 1403 (4th Cir. 1969).

§ 55-70. Voting inspectors.

(a) Unless the charter or the bylaws otherwise provide, the board of directors in advance of any meeting of shareholders may appoint one or three voting inspectors to act at any such meeting or adjournment thereof, and in the absence of such appointment the officer or person acting as chairman of the meeting may, and shall if so requested by any shareholder or proxy holder, make such appointment. Any vacancy, whether from refusal to act or otherwise, may be filled by appointment of the chairman. If there are three inspectors, the decision or certificate of any two shall be effective as the act of all.

(b) The voting inspectors shall determine the number of shares outstanding, the voting power of each, the shares represented at the meeting, the existence of a quorum, the authenticity, validity and effect of proxies, receive votes, ballots, assents or consents, hear and determine all challenges and questions in any way arising in connection with the vote, count and tabulate all votes, assents and consents, determine and announce the result, and do such acts as may be proper to conduct the election or vote with fairness to all shareholders.

(c) On request, the inspectors shall make a report in writing of any challenge, question or matter determined by them and make and execute a certificate of any fact found by them.

(d) The certificate of the inspectors shall be prima facie evidence of the facts stated therein and of the vote as certified by them, unless overruled by a vote of a majority of the shares represented at the meeting, exclusive of the shares as to which there is a controversy. (1955, c. 1371, s. 1.)

§ 55-71. Proceeding to determine validity of election or appointment of directors or officers.

(a) Any shareholder or director of a domestic corporation may commence a summary proceeding in the superior court to determine any controversy with respect to any election or appointment of any director or officer of such corporation, and any shareholder or director of a foreign corporation authorized to transact business in this State shall have the same right with respect to any election held within this State.

(b) The proceeding shall be brought in the county in which the registered office of the corporation is located in this State.

(c) The proceeding shall be commenced by filing a verified petition in the superior court directed to the resident judge or any judge holding court in the district.

(d) The petition shall include:

- (1) The name of the county and court in which the proceeding is brought, and the title of the proceeding, which shall include as respondents the corporation, the person or persons whose purported election or appointment is questioned, and any person other than the petitioner, whom the petitioner alleges to have been elected or appointed.
- (2) A plain and concise statement of the facts constituting the grounds for contesting the validity of the election or appointment, and a prayer for the relief sought.

(e) Upon filing of the petition a notice to the respondents fixing a time and place for the hearing, which place may be anywhere in the district, shall be signed and issued by any petitioner or his counsel. No summons shall be necessary, but a copy of the notice and petition shall be served upon each respondent at least 10 days prior to the hearing. If it appears by the petition or separate affidavits to the satisfaction of the judge that the respondent to be served cannot, after due diligence, be found in the State, the judge shall, at the election of the petitioner, either:

- (1) Make an order for service by publication and direct that one publication of a notice, which shall include the time and place of the hearing, and statement of the notice of the relief sought be made in a designated newspaper qualified for legal advertising pursuant to G.S. 1-597; or
- (2) Make an order for service of the notice and a copy of the petition outside the State pursuant to G.S. 1-104.

In the cases in which service by publication is allowed, the notice and petition is deemed served at the expiration of seven days from the date of the publication, and the party so served is then in court.

(f) Upon or after the filing of the petition and issuance of the notice the judge may, upon application, issue an interlocutory order restraining the directors or officers whose election or appointment is challenged from acting, and may make such other order as he may deem proper with respect to the directors or officers who shall hold the contested offices pending the determination of the matter in controversy.

(g) The petition shall be heard at the time and place fixed in the notice or at such later time or other place in the district as the judge may designate. The hearing may be in chambers and shall be heard upon affidavit or oral testimony or both, in the discretion of the judge.

(h) Upon completion of the hearing the judge, in determining the matter, may:

- (1) Declare the result of the election or appointment in controversy;
- (2) Order a new election or appointment and may include in such order provisions with respect to the directors or officers who shall hold the contested offices until a new election is held or appointment is made;
- (3) Determine the respective voting rights of shareholders and of persons claiming to own shares;
- (4) Direct such other relief as may be just and proper.

The order may be signed, either in or out of the district in which the hearing is held. (1901, c. 2, s. 47; Rev., s. 1189; C.S., s. 1177; 1935, c. 413; 1937, c. 347; G.S., s. 55-114; 1955, c. 1371, s. 1.)

Editor's Note. — Section 1-104, referred to in subdivision (e)(2), was repealed by Session Laws 1967, c. 954, s. 4.

CASE NOTES

Editor's Note. — Many of the cases cited below were decided under former § 55-114.

Section Is Constitutional. — This section, empowering the court to continue corporate officers in their respective offices with the same authority and emoluments enjoyed by them prior to controversy, provides an emergency remedy which does not affect the status of the corporation but merely preserves the status quo pending determination of controversy in order that the corporation may continue to function, not under the supervision of the court, but by virtue of corporate authority theretofore given, and therefore the remedy violates no constitutional right of stockholders or directors, but only imposes upon them the rules of fair play in the exercise of their property rights. *Thomas v. Baker*, 227 N.C. 226, 41 S.E.2d 842 (1947).

Purpose of Section. — This section in its entirety is directed at determining rights and duties resulting from an election held which is contested as to its validity. *Swenson v. All Am. Assurance Co.*, 33 N.C. App. 458, 235 S.E.2d 793 (1977).

Section is remedial in character. *Thomas v. Baker*, 227 N.C. 226, 41 S.E.2d 842 (1947); *Swenson v. All Am. Assurance Co.*, 33 N.C. App. 458, 235 S.E.2d 793 (1977).

Summary Procedure Permitted. — This section allows a summary procedure to be held, without the benefit of service of process, whenever there is a dispute surrounding the election of corporate officers or directors. *Foreman v. Bell*, — N.C. App. —, 289 S.E.2d 567 (1982).

Section pertains only to corporate elections. It does not apply to the selection of persons who hold and vote stock for others. *Foreman v. Bell*, — N.C. App. —, 289 S.E.2d 567 (1982).

Section Does Not Apply to Prospective Election Meetings. — The wording of this section clearly indicates that it applies only to contested elections after the fact and not to prospective meetings for the holding of election. *Swenson v. All Am. Assurance Co.*, 33 N.C. App. 458, 235 S.E.2d 793 (1977); *Foreman v. Bell*, — N.C. App. —, 289 S.E.2d 567 (1982).

Corporation shall continue to function pending settlement of the dispute, not under the supervision of the court, but by virtue of

corporate authority theretofore bestowed. Hence the summary proceeding to avoid temporary corporate paralysis. *Thomas v. Baker*, 227 N.C. 226, 41 S.E.2d 842 (1947).

Section Designed to Maintain Status Quo. — This section is remedial in nature and it is designed to maintain the status quo while the disputes regarding an election are resolved. *Foreman v. Bell*, — N.C. App. —, 289 S.E.2d 567 (1982).

This section provides a method of leaving a corporation in status quo so the corporate business can be continued while the validity of an election already held is determined. *Swenson v. All Am. Assurance Co.*, 33 N.C. App. 458, 235 S.E.2d 793 (1977).

Authority and Emoluments of Officers Continued in Office. — An order continuing corporate officers in their respective offices necessarily carries with it authorization and direction that such officers should continue to exercise the same functions and receive the same emoluments as before the controversy giving rise to the proceeding. *Thomas v. Baker*, 227 N.C. 226, 41 S.E.2d 842 (1947).

Dispute as to Powers of President. — Where the directors of a corporation are evenly divided in a dispute as to whether its president should exercise managerial powers, and by reason of such division are unable to elect any officers of the corporation or resolve their differences over the management of the corporation, the superior court has jurisdiction in the premises under the statute upon petition properly filed. *Thomas v. Baker*, 227 N.C. 226, 41 S.E.2d 842 (1947).

Interference with Officers in Performance of Their Duties. — The jurisdiction of the superior court to grant relief against the wrongful interference with the officers in the performance of their duties or the wrongful refusal of an officer to perform the duties of his office cannot be invoked in a proceeding under this section. *Thomas v. Baker*, 227 N.C. 226, 41 S.E.2d 842 (1947).

Appointment of Receiver. — In a proceeding under this section the judge of the superior court has no jurisdiction to appoint a receiver for the corporation. In re *Hotel Raleigh, Inc.*, 207 N.C. 521, 177 S.E. 648 (1935).

Applied in *Stein v. Capital Outdoor Adv., Inc.*, 273 N.C. 77, 159 S.E.2d 351 (1968).

§ 55-72. Voting trust.

(a) Any number of shareholders of a corporation may, for any proper business purpose, create a voting trust, revocable or irrevocable, conferring upon a trustee or trustees the right to vote or otherwise represent their shares, for a period of not to exceed 10 years, by entering into a written voting trust

agreement specifying the terms and conditions of the voting trust, by depositing an executed copy of the agreement with the corporation at its registered office, and by transferring their shares to such trustee or trustees for the purposes of the agreement. Trust certificates shall be issued by the trustees for the shares so transferred. The said copy of the voting trust agreement so deposited with the corporation shall be subject to the absolute right of examination by any shareholder of the corporation, in person or by agent, or by any holder of a beneficial interest in the voting trust, either in person or by agent, at any reasonable time.

(b) Such trustee or trustees shall also cause to be kept a record of trust certificate holders similar to the record of shareholders required to be kept by corporations under this Chapter and such record shall be made available for inspection by trust certificate holders or by shareholders of the corporation who submit to the trustee or trustees satisfactory proof of their ownership of shares, all subject to the same terms, conditions, qualifications and penalties as are prescribed in G.S. 55-38 with respect to inspection by shareholders of the record of shareholders. The holder of a trust certificate shall be considered to be a shareholder of the shares represented by his trust certificate with respect to his right to inspect corporate books and records.

(c) Notwithstanding the provisions of this section or of G.S. 55-59, the holders of record of the voting trust certificates shall have the same rights as if they were shareholders of record with respect to voting upon any amendment of the charter, amendment of the bylaws, reduction of stated capital, sale of the entire assets, merger, consolidation or dissolution. For this purpose the trustees, upon timely and adequate information and requests from the corporation, shall prepare and furnish the corporation with a list of the trust certificate holders, which shall conform substantially to the requirements of this Chapter relating to voting lists of shareholders, and the corporation shall send all proper notices, maintain and make available the said list for inspection and make all appropriate arrangements to permit the trust certificate holders to vote in person or by proxy at the meeting in question as if they were shareholders of record. This subsection (c) shall not apply to any voting trust initially created on or after October 1, 1973; and any voting trust created before that date may be amended by unanimous consent of the holders of record of the voting trust certificates to provide that this subsection (c) shall not thereafter be applicable to such voting trust.

(d) The trustee or trustees under a voting trust agreement shall, except to the extent otherwise provided by the agreement or subsection (c) of this section, have the right to vote upon and exercise any rights of dissent with respect to any charter amendment, merger, consolidation, dissolution, sale of assets or reduction of stated capital of the corporation.

(e) At any time before the expiration of a voting trust agreement as originally created or as extended under this subsection, one or more holders of voting trust certificates may, by agreement in writing, extend the duration of such agreement, nominating the same or substitute trustee or trustees, for an additional period not to exceed 10 years from the date of such expiration. Such extension agreement shall not affect the rights or obligations of persons not parties to the extension agreement, and such persons shall be entitled to remove their shares from the trust upon the expiration of the voting trust agreement and promptly to have their share certificates reissued to them. The extension agreement shall comply with all provisions of this section applicable to the original voting trust agreement.

(f) The validity of a voting trust agreement, otherwise lawful, shall not be affected during a period of 10 years from the date of its creation or extension by the fact that by its terms it will or may last beyond such 10-year period. (1955, c. 1371, s. 1; 1963, c. 1233; 1973, c. 469, ss. 26-28.)

Legal Periodicals. — For note entitled "Voting Trusts — Should Trust Principles Apply to Close Corporations?" see 48 N.C.L. Rev. 342 (1970).

CASE NOTES

Cited in *Stein v. Capital Outdoor Adv., Inc.*, 273 N.C. 77, 159 S.E.2d 351 (1968); *Blount v. Taft*, 295 N.C. 472, 246 S.E.2d 763 (1978).

§ 55-73. Shareholders' agreements.

(a) An agreement between two or more shareholders, if in writing and signed by the parties thereto, may provide that in the exercise of any voting rights of shares held by the parties, including any vote with respect to directors, such shares shall be voted as provided by the agreement, or as the parties may agree, or as determined in accordance with any procedure (including arbitration) specified in the agreement. Such agreement shall be valid and enforceable as between the parties thereto for a period not to exceed 10 years from the date of its execution; and in an action by a shareholder who is a party to such an agreement a court of competent jurisdiction may enjoin another party or parties to the agreement from voting his or their shares in violation thereof, or, if the corporation is made a party to the action, may set aside an election of directors or other action resulting from the voting of shares in violation of the agreement, and may grant such other or further relief as may appear appropriate under the circumstances for the enforcement of the agreement. Such agreement may be extended or renewed in like manner as a voting trust may be extended or renewed as provided by G.S. 55-72(e). Nothing herein shall impair the privilege of the corporation to treat the shareholders of record as entitled to vote the shares standing in their names, as provided in G.S. 55-59 nor impair the power of a court to determine voting rights as provided in G.S. 55-71.

(b) Except in cases where the shares of the corporation are at the time or subsequently become generally traded in the markets maintained by securities dealers or brokers, no written agreement to which all of the shareholders have actually assented, whether embodied in the charter or bylaws or in any side agreement in writing and signed by all the parties thereto, and which relates to any phase of the affairs of the corporation, whether to the management of its business or division of its profits or otherwise, shall be invalid as between the parties thereto, on the ground that it is an attempt by the parties thereto to treat the corporation as if it were a partnership or to arrange their relationships in a manner that would be appropriate only between partners. Notwithstanding any other provision of this section or of this Chapter, the provisions of G.S. 55-59(a) shall not apply to such an agreement. A transferee of shares covered by such agreement who acquires them with knowledge thereof is bound by its provisions.

(c) An agreement between all or less than all of the shareholders, whether solely between themselves or between one or more of them and a party who is not a shareholder, is not invalid, as between the parties thereto, on the ground that it so relates to the conduct of the affairs of the corporation as to interfere with the discretion of the board of directors, but the making of such an agreement shall impose upon the shareholders who are parties thereto the liability for managerial acts that is imposed by this Chapter upon directors. (1955, c. 1371, s. 1; 1973, c. 469, s. 29; 1981 (Reg. Sess., 1982), c. 1163.)

Effect of Amendments. — The 1981 (Reg. Sess., 1982) amendment substituted "G.S. 55-72(e)" for "G.S. 55-72(d)" in the next-to-last sentence of subsection (a).

Legal Periodicals. — For article discussing this section, see 34 N.C.L. Rev. 432 (1956).

For note entitled "Voting Trusts — Should Trust Principles Apply to Close Corporations?" see 48 N.C.L. Rev. 342 (1970).

For comment on tax and corporate aspects of professional incorporation in North Carolina, see 48 N.C.L. Rev. 573 (1970).

For article surveying 1976 case law on commercial law, see 55 N.C.L. Rev. 943 (1977).

For note on unanimous approval of corporate

bylaws and creation of shareholder agreements, see 1 Campbell L. Rev. 153 (1979).

For note on the amendment of shareholder agreements of close corporations in North Carolina, see 15 Wake Forest L. Rev. 531 (1979).

For note on close corporations and personal liability from execution of shareholder agreements, see 16 Wake Forest L. Rev. 975 (1980).

CASE NOTES

- I. General Consideration.
- II. Decisions under Subsection (b).
- III. Amendment and Termination.

I. GENERAL CONSIDERATION.

Intent of Section. — This section was not intended to, and it does not, define "shareholders' agreements" to mean only those arrangements which are an attempt to treat the corporation as if it were a partnership or which arrange relationships in a manner that would be appropriate only between partners. *Blount v. Taft*, 295 N.C. 472, 246 S.E.2d 763 (1978).

The authorization of shareholders' agreements was a recognition of the needs of stockholders in a close corporation to be able to protect themselves from each other and from hostile invaders. *Blount v. Taft*, 295 N.C. 472, 246 S.E.2d 763 (1978).

The reason for phrasing the provisions of this section mainly in the negative was to provide latitude to both the shareholders who enter into agreements which relate to the affairs of the corporation and to the courts which must construe and assess their contracts. *Blount v. Taft*, 295 N.C. 472, 246 S.E.2d 763 (1978).

The provisions of this section are designed to permit the management of close corporations by shareholders thereof who act by other than normal corporate procedures, and such actions by the shareholders, if so intended, must perforce bind the corporation. *Snyder v. Freeman*, 300 N.C. 204, 266 S.E.2d 593 (1980).

Principal Provision as to Close Corporations. — With respect to close corporations, the heart of the North Carolina Business Corporation Act is this section. *Blount v. Taft*, 295 N.C. 472, 246 S.E.2d 763 (1978).

By means of a shareholders' agreement a small group of investors who seek gain from direct participation in their business and not from trading its stock or securities in the open market can adopt the decision-making procedures of partnership, avoid the consequences of majority rule (the standard operating procedure for corporations), and still enjoy the tax advantages and limited liability of a corporation. Such businesses are often called

"incorporated partnerships." *Blount v. Taft*, 295 N.C. 472, 246 S.E.2d 763 (1978).

Shareholders' Agreement Defined. — A shareholders' agreement is a contract between shareholders which may apply broadly to the rights of the shareholders in conducting the business of the corporation, so long as their purposes are legal and not contrary to public policy. *Blount v. Taft*, 29 N.C. App. 626, 225 S.E.2d 583 (1976), *aff'd*, 295 N.C. 472, 246 S.E.2d 763 (1978).

In a broad sense the term "shareholders' agreement" refers to any agreement among two or more shareholders regarding their conduct in relation to the corporation whose shares they own. *Blount v. Taft*, 295 N.C. 472, 246 S.E.2d 763 (1978).

Terms "bylaw" and "shareholders' agreement" are not mutually exclusive. Bylaws which are unanimously enacted by all the shareholders of a corporation are also shareholders' agreements. *Blount v. Taft*, 295 N.C. 472, 246 S.E.2d 763 (1978).

Function of Shareholders' Agreement. — Ordinarily the function of a shareholders' agreement is to avoid the consequences of majority rule or other statutory norms imposed by the corporate form. *Blount v. Taft*, 295 N.C. 472, 246 S.E.2d 763 (1978).

Partnership-like Management Enabled. — This section enables the shareholders of a close corporation by agreement in writing assented to by all to provide for the management and operation of the corporation in a manner similar to a partnership. *Blount v. Taft*, 29 N.C. App. 626, 225 S.E.2d 583 (1976), *aff'd*, 295 N.C. 472, 246 S.E.2d 763 (1978).

No particular title, phrasing or content is necessary for a consensual arrangement among all shareholders to constitute a "shareholders' agreement." *Blount v. Taft*, 295 N.C. 472, 246 S.E.2d 763 (1978).

Form and Substance May Vary. — The form and substance of a shareholders'

agreement will vary with the nature of the business and the objectives of the parties. *Blount v. Taft*, 295 N.C. 472, 246 S.E.2d 763 (1978).

Who May Be Party to an Agreement. — A shareholders' agreement may be between stockholders in a corporation the shares of which are publicly traded or one whose shares are closely held. However, agreements among shareholders are primarily a feature of close corporations. *Blount v. Taft*, 295 N.C. 472, 246 S.E.2d 763 (1978).

Agreement as to Voting Is Valid Absent Fraud or Prejudice. — This Chapter clearly aligns North Carolina with the majority of jurisdictions which hold that a contract entered into between corporate stockholders to which they agree to vote their stock in a specified manner — including agreements for the election of directors and corporate officers — is not invalid, unless it is inspired by fraud or will prejudice the other stockholders. *Wilson v. McClenny*, 262 N.C. 121, 136 S.E.2d 569 (1964); *Stein v. Capital Outdoor Adv., Inc.*, 273 N.C. 77, 159 S.E.2d 351 (1968).

Agreements for Future Management Must Be "Otherwise Lawful". — Both this section and § 55-24 require that contemplated agreements providing for the future management and control of a corporation be "otherwise lawful." *Wilson v. McClenny*, 262 N.C. 121, 136 S.E.2d 569 (1964).

When Such Agreements Held Invalid. — Agreements providing for the future management and control of a corporation which violate the express charter or statutory provision, contemplate an illegal object, involve any fraud, oppression or wrong against other stockholders or are made in consideration of a private benefit to the promisor, will be declared invalid. *Wilson v. McClenny*, 262 N.C. 121, 136 S.E.2d 569 (1964).

Invalidation of Agreements. — A shareholders' agreement is not valid and enforceable merely because it fits the specifications of this section. It can be invalidated under the law of contracts upon any ground which would entitle a party to such relief. *Blount v. Taft*, 295 N.C. 472, 246 S.E.2d 763 (1978).

Burden of Proof of Valid Agreement. — Those who have the burden of proving a valid shareholders' agreement could ease this burden by offering an agreement in writing signed by all shareholders, or if embodied in the charter or bylaws, explicit designation therein of a shareholders' agreement and provision for alteration of the agreement if different from the alteration or amendment provisions applicable to the charter or bylaw provisions which are not within the agreement. *Blount v. Taft*, 295 N.C. App. 626, 225 S.E.2d 583 (1976), *aff'd*, 295 N.C. 472, 246 S.E.2d 763 (1978).

Enforcement of Agreements. — Agreements by shareholders to vote their shares so as to cause their corporation to take certain action are generally enforceable against the shareholders. *Snyder v. Freeman*, 300 N.C. 204, 266 S.E.2d 593 (1980).

Agreements Construed and Enforced Like Contracts. — Since consensual arrangements among shareholders are agreements — the products of negotiation — they should be construed and enforced like any other contract so as to give effect to the intent of the parties as expressed in their agreements, unless they violate the express charter or statutory provision, contemplate an illegal object, involve fraud, oppression or wrong against other shareholders, or are made in consideration of a private benefit to the promisor. *Blount v. Taft*, 295 N.C. 472, 246 S.E.2d 763 (1978); *Snyder v. Freeman*, 300 N.C. 204, 266 S.E.2d 593 (1980).

II. DECISIONS UNDER SUBSECTION (B).

Intent of Subsection (b). — Subsection (b) was intended to supply a legal framework within which partner-like arrangements having a reasonable business purpose could be worked out with substantial assurance of legal validity. *Blount v. Taft*, 29 N.C. App. 626, 225 S.E.2d 583 (1976), *aff'd*, 295 N.C. 472, 246 S.E.2d 763 (1978).

Subsection (b), like the other two subsections, simply abrogates, as to agreements within its purview, certain judicial doctrines which had formerly invalidated particular shareholders' agreements on those grounds which this section now disallows. *Blount v. Taft*, 295 N.C. 472, 246 S.E.2d 763 (1978).

Language in subsection (b) has been widely borrowed for the close corporations statutes of several other jurisdictions. *Blount v. Taft*, 295 N.C. 472, 246 S.E.2d 763 (1978).

Effect of Subsection (b) Generally. — Subsection (b) creates no distinctions between a shareholders' agreement in which the parties seek to deal with the corporation as a partnership and any other stockholders' agreement which relates to any phase of the affairs of the corporation. It adds nothing, either expressly or impliedly, to the words of the agreement; nor does it suspend the rules of contract law relating to its construction, modification or rescission. It merely provides that a shareholders' agreement in which the parties seek to deal with affairs of the corporation in a manner which would be appropriate only between partners is not invalid for that reason. *Blount v. Taft*, 295 N.C. 472, 246 S.E.2d 763 (1978).

To meet the requirements of subsection (b) for establishing a valid shareholders' agreement in a close corporation, there must be an agreement in writing of all shareholders; but the writing may consist of a written provi-

sion in the charter or bylaws of the corporation which may be based on an oral agreement which has been embodied therein. *Blount v. Taft*, 29 N.C. App. 626, 225 S.E.2d 583 (1976), aff'd, 295 N.C. 472, 246 S.E.2d 763 (1978).

Consensual agreements coming within subsection (b) are shareholders' agreements whether they are embodied in the bylaws or in a duly executed side agreement. *Blount v. Taft*, 295 N.C. 472, 246 S.E.2d 763 (1978).

III. AMENDMENT AND TERMINATION.

Amendment of Agreement in Charter or Bylaws. — When parties to a shareholders' agreement choose to embody it in the charter or bylaws, it must be concluded that they intended

for statutory or common-law norms governing amendment to apply absent an expressed intention to deviate from them. *Blount v. Taft*, 295 N.C. 472, 246 S.E.2d 763 (1978).

If a shareholders' agreement is made a part of the charter or bylaws it will be subject to amendment as provided therein or, in the absence of an internal provision governing amendments, as provided by the statutory norms. *Blount v. Taft*, 295 N.C. 472, 246 S.E.2d 763 (1978).

How Altered or Terminated. — A shareholders' agreement may not be altered or terminated except as provided by the agreement, or by all the parties, or by operation of law. *Blount v. Taft*, 29 N.C. App. 626, 225 S.E.2d 583 (1976), aff'd, 295 N.C. 472, 246 S.E.2d 763 (1978).

§ 55-74: Omitted.

ARTICLE 7.

Uniform Stock Transfer Act.

§§ 55-75 to 55-98: Repealed by Session Laws 1965, c. 700, s. 2.

Cross References. — For provisions of the Uniform Commercial Code as to investment securities, see §§ 25-8-101 to 25-8-406.

ARTICLE 8.

Fundamental Changes.

§ 55-99. Right to amend charter.

(a) Subject to the limitations set forth in G.S. 55-100, 55-101 and 55-103, a corporation may amend its charter at any time in any respect that may be desired, but no amendment shall contain provisions which would be forbidden in original articles of incorporation. No inference shall be drawn from the broad power of amendment conferred by this Chapter that the exercise of that power in a particular case is fair and equitable.

(b) In particular, and without limitation upon the foregoing general power of amendment, a corporation may amend its charter from time to time, so as:

- (1) To change its corporate name.
- (2) To change its period of duration.
- (3) To change, enlarge or diminish its corporate purposes.
- (4) To increase or decrease the aggregate number of shares, or shares of any class, which the corporation has authority to issue.
- (5) To increase or decrease the par value of the authorized shares of any class having a par value, whether issued or unissued.
- (6) To exchange, classify, reclassify or cancel all or any part of its shares, whether issued or unissued.
- (7) To change the designation of all or any part of its shares, whether issued or unissued, and to change any rights, preferences or limitations in respect of all or any part of its shares, whether issued or unissued.

- (8) To change shares having a par value, whether issued or unissued, into the same or a different number of shares without par value, and to change shares without par value, whether issued or unissued, into the same or a different number of shares having a par value.
 - (9) To change the shares of any class, whether issued or unissued, and whether with or without par value, into a different number of shares of the same class or into the same or a different number of shares, either with or without par value, of other classes.
 - (10) To create new classes of shares having rights and preferences either prior and superior or subordinate and inferior to the shares of any class then authorized, whether issued or unissued.
 - (11) To cancel or otherwise affect the right of the holders of the shares of any class with respect to accrued dividends or dividend credits as defined in this Chapter.
 - (12) To divide any preferred or special class of shares, whether issued or unissued, into series and fix and determine the designations of such series and the variations in the relative rights and preferences as between the shares of such series.
 - (13) To authorize the board of directors to establish, out of authorized but unissued shares, series of any preferred or special class of shares and fix and determine the relative rights and preferences of the shares of any series so established.
 - (14) To authorize the board of directors to fix and determine the relative rights and preferences of the authorized but unissued shares of series theretofore established in respect of which either the relative rights and preferences have not been fixed and determined or the relative rights and preferences theretofore fixed and determined are to be changed.
 - (15) To revoke, diminish, or enlarge the authority of the board of directors to establish series out of authorized but unissued shares of any preferred or special class and fix and determine the relative rights and preferences of the shares of any series so established.
 - (16) To limit, deny or grant to shareholders of any class the preemptive right to acquire additional or treasury shares of the corporation, whether then or thereafter authorized.
 - (17) To change the corporation into a nonprofit corporation or a cooperative organization.
- (c) Any amendment of the charter made pursuant to this Chapter extends to all rights theretofore existing under the charter as fully as if this Chapter, including such future changes therein as may be made, had been in effect at the time of the filing of the original articles of incorporation. (1901, c. 2, ss. 29, 30, 37; 1903, c. 510; Rev., ss. 1175, 1178; C.S., s. 1131; 1927, c. 142; G.S., s. 55-31; 1955, c. 1371, s. 1; 1959, c. 1316, s. 29.)

CASE NOTES

Amendment Operates Prospectively. — Whether the law itself makes an amendment, or confers the power of amendment on the corporation, the amendment will not be construed to operate retrospectively to the detriment of rights already vested under the old charter. *Patterson v. Durham Hosiery Mills*, 214 N.C. 806, 200 S.E. 906 (1939).

A charter amendment requiring consent of three fourths in interest of the preferred

stockholders to the issuing of bonds or securities of prior or equal rank is prospective in effect, and does not constitute a waiver of the right to the declaration of accrued, accumulated dividends, when earned, by permitting the interposing of new preferred stock by agreement of three fourths of the preferred stockholders, nor does legislative authority to amend the charter extend to authority to defeat the vested right to the declaration of such divi-

dends by amendment of the charter. *Patterson v. Durham Hosiery Mills*, 214 N.C. 806, 200 S.E. 906 (1939).

§ 55-100. Procedure to amend charter.

(a) Before the issuance of any shares, including acceptance of any subscriptions for shares, amendments to the charter may be made, either by the directors named therein or by the incorporators, by preparing and delivering to the Secretary of State articles of amendment complying with the provisions of G.S. 55-103. If any such amendment makes a material change, nonassenting subscribers for shares are entitled to rescind their subscriptions.

(b) After the issuance of any shares, including acceptance of any subscription for shares, amendments to the charter shall be made in the following manner:

- (1) The board of directors or the executive committee shall adopt a resolution setting forth the proposed amendment and directing that it be submitted to a vote at a meeting of shareholders, which may be either an annual or a special meeting. In lieu thereof, a resolution setting forth a proposed amendment and requesting its submission to such a meeting may be approved in writing by such shareholders as would be entitled to a call of a shareholders' meeting pursuant to the provisions of G.S. 55-61(c).
- (2) Written or printed notice setting forth the proposed amendment or a summary of the changes to be effected thereby shall be given in or with the notice of the meeting to each shareholder of record entitled to vote thereon. If the amendment would give rise to a dissenter's right of payment for his shares under this Chapter, such notice shall contain a statement, displayed with a reasonable prominence, to the effect that dissenting shareholders are entitled, upon compliance with G.S. 55-113 including the 20-day notice requirement, to be paid the fair value of their shares as therein provided, but failure of the notice to contain such a statement shall not invalidate the amendment.
- (3) At such meeting a vote of the shareholders entitled to vote thereon shall be taken on the proposed amendment. The proposed amendment shall be adopted upon receiving the affirmative vote of the holders of at least a majority of all the outstanding shares entitled to vote thereon, unless any class of shares is entitled to vote thereon as a class, in which event the proposed amendment shall be adopted upon receiving the affirmative vote of the holders of at least a majority of all the outstanding shares of each class of shares entitled to vote thereon as a class and a majority of all the other outstanding shares entitled to vote thereon. If the charter prescribes a different quorum or requires more than the majority vote herein prescribed, either for all amendments or for a specific amendment, such charter provision can itself be amended or repealed only by the shareholders acting pursuant to any different quorum and greater vote so prescribed. An amendment to the charter which adds a provision for liquidation or dissolution of the corporation as permitted by G.S. 55-125(a)(3), or which changes or repeals such a provision, must be approved by the affirmative vote of the holders of all the outstanding shares of the corporation, whether or not otherwise entitled to vote, or by the holders of such lesser number of shares, but not less than the number required for a regular charter amendment, as may be specifically provided in the charter for adding, changing or repealing such a provision.

(4) There shall be prepared and delivered to the Secretary of State articles of amendment complying with the provisions of G.S. 55-103.

(c) Any number of amendments may be submitted to the shareholders, and voted upon by them, at one meeting.

(d) At any time before delivery of the articles of amendment to the Secretary of State the board of directors may, in their discretion, abandon an amendment if so empowered in the resolutions of the shareholders adopting the amendment. (1893, c. 380; 1899, c. 618; 1901, c. 2, ss. 28, 29, 30, 37; 1903, c. 510; Rev., ss. 1174, 1175, 1178; C.S., ss. 1130, 1131; 1925, c. 118, ss. 1, 2a; 1927, c. 142; 1931, c. 243, ss. 4, 5; 1933, c. 100, ss. 7, 8; 1941, c. 97, s. 5; G.S., ss. 55-30, 55-31; 1953, c. 54; c. 119, ss. 1, 2; 1955, c. 1371, s. 1; 1959, c. 1316, s. 25; 1973, c. 469, s. 30.)

Legal Periodicals. — For note on creation of shareholder agreements, see 1 unanimous approval of corporate bylaws and Campbell L. Rev. 153 (1979).

CASE NOTES

Subscriber Released by Fundamental Change. — Any fundamental change in the charter of a corporation relieves a nonassenting

subscriber from liability upon his stock. Bank (First Nat'l) v. City of Charlotte, 85 N.C. 433 (1881).

§ 55-101. Class voting and objecting shareholders' rights on amendments.

(a) The holders of outstanding shares of a class shall be entitled as a class to vote, whether or not otherwise entitled to vote by the provisions of the charter, upon a proposed amendment which would:

- (1) Cancel or otherwise affect their rights to accrued dividends or dividend credits as defined in this Chapter,
- (2) Reduce the dividend preference thereof,
- (3) Make noncumulative, in whole or in part, the dividends thereof which had theretofore been cumulative,
- (4) Reduce the redemption price thereof or make them subject to redemption when they are not otherwise redeemable,
- (5) Reduce any preferential amount payable thereon upon voluntary or involuntary liquidation,
- (6) Eliminate, diminish, or alter adversely conversion rights pertaining thereto,
- (7) Eliminate, diminish or alter adversely voting rights pertaining thereto, either directly or by increasing the relative voting rights per share of the shares of another class,
- (8) Diminish or alter adversely any options or rights of the holders thereof to purchase other shares of the corporation,
- (9) Change adversely any sinking fund provision relating thereto,
- (10) Rearrange the preferences of such outstanding shares so as to make them subject to the preferences of other than authorized shares, issued or unissued, as to distribution by way of dividends or otherwise,
- (11) Increase the rights and preferences of any other class of shares having equal or prior or superior rights or preferences,
- (12) Authorize a new class of shares having prior or superior rights or preferences or confer voting rights on holders of debt securities as permitted by the provisions of G.S. 55-44.1, or
- (13) Change the corporation into a nonprofit corporation or a cooperative organization.

(b) Any objecting shareholder shall have the right to be paid the value of his shares in accordance with the provisions of G.S. 55-113, if an amendment of the charter would change the corporation into a nonprofit corporation or cooperative organization; and an objecting holder of shares entitled to any preference as to dividends or liquidation shall have the right to be paid the value of his shares in accordance with the provisions of G.S. 55-113 if:

- (1) An amendment of the charter would effect the changes in his shares described in subdivisions (1), (2), (3), (4), or (5) of subsection (a) of this section or would to his prejudice create or increase any priority, dividend preference, cumulative dividend right, redemption price or liquidation preference of any other then issued shares, or
- (2) Pursuant to a plan of recapitalization involving an offer to shareholders of his class to exchange their shares, on which there are accrued dividends or dividend credits as defined in this Chapter, for a new class of shares having preferences as to dividends or liquidation prior to shares of the class, a currently adopted amendment would authorize the corporation to issue shares of such new class, and such plan of recapitalization if consummated. (1955, c. 1371, s. 1; 1959, c. 1316, ss. 30, 31; 1969, c. 751, s. 36.)

CASE NOTES

Stated in *Jackson v. Stanwood Corp.*, 38 N.C. App. 479, 248 S.E.2d 576 (1978).

§ 55-102. Offer of exchange of securities for preferred shares; rights of objecting shareholders.

(a) If an offer is made by the corporation to holders of any class of its shares having accrued dividends or dividend credits, as defined in this Chapter, to exchange said shares for securities which would be entitled to preference in the receipt of any periodical payment or dividend over said shares, and if the authority of the corporation to issue such securities would require no amendment of the charter, and if the offer is accepted by any shareholder, then any holder of said shares who objects to the terms of the offer shall have the right to be paid the value of his shares in accordance with the provisions of G.S. 55-113.

(b) All such offers shall be in writing and shall contain the statement, displayed with reasonable prominence, to the effect that shareholders objecting to its terms are entitled, upon compliance with the provisions of G.S. 55-113, including the 20-day notice requirement, to be paid the fair value of their shares as therein provided, but failure to set forth such a statement shall not invalidate any consummated exchanges. (1955, c. 1371, s. 1.)

Cross References. — As to rights of dissenting shareholders, see §§ 55-100, 55-108, and 55-113.

§ 55-103. Articles of amendment.

(a) The articles of amendment, other than for an amendment under subsection (b) of this section, shall be executed by the corporation and filed, as provided in G.S. 55-4 and shall set forth:

- (1) The name of the corporation.
- (2) The amendment so adopted. And if the amendment changes the corporation into a nonprofit corporation or a cooperative organization, there shall be included a statement of purpose appropriate for a nonprofit corporation or a cooperative organization as the case may be.
- (3) The date of the adoption of the amendment by the shareholders.
- (4) The number of shares outstanding, and the number of shares entitled to vote thereon, and if the shares of any class are entitled to vote thereon as a class, the designation and number of outstanding shares entitled to vote thereon of each such class.
- (5) The number of shares voted for and against such amendment, respectively, and, if the shares of any class are entitled to vote thereon as a class, the number of shares of each such class voted for and against such amendment, respectively.
- (6) If such amendment provides for an exchange, reclassification or cancellation of issued shares, and if the manner in which the same shall be effected is not set forth in the amendment, then a statement of the manner in which the same shall be effected.
- (7) If such amendment effects a change in the amount of stated capital of the corporation, then a statement of the manner in which the same is effected and a statement expressed in dollars, of the amount of stated capital as changed by such amendment. If the amendment would reduce the stated capital of the corporation, the articles may be entitled "Articles of Amendment and Reduction of Capital."
- (8) Either, (i) a recital of the statement, if any, contained in the notice to shareholders informing them, as and if required by G.S. 55-100(b)(2), of dissenter's rights to payment, or (ii) a brief explanation of why the amendment does not give rise to dissenter's rights under G.S. 55-101(b).

(b) If the amendment is made by the directors or incorporators as permitted by subsection (a) of G.S. 55-100, the articles of amendment shall be executed by the directors or incorporators, as the case may be, and be filed, as provided in G.S. 55-4, and shall set forth the name of the corporation, the amendment so adopted, and the statement that the amendment is made by the directors or incorporators before the issuance of any shares. (1955, c. 1371, s. 1; 1959, c. 1316, s. 32.)

§ 55-104. Effect of amendment.

No amendment shall affect any existing cause of action in favor of or against such corporation, or its officers or directors, or any pending suit to which such corporation or its officers or directors shall be a party, or the existing rights of persons other than shareholders; and, in the event the corporate name shall be changed by amendment, no suit brought by or against such corporation under its former name shall abate for that reason. (1955, c. 1371, s. 1.)

§ 55-105. Restated charter.

(a) At any time after its charter has been amended a corporation may by action of its board of directors, without necessity of vote of the shareholders, cause to be prepared a document entitled "Restated Charter," which shall integrate into one document its original articles of incorporation (or articles of consolidation) and all amendments thereto, including those effected by articles of merger, and any statement of classification of shares filed pursuant to G.S. 55-42(e), except that:

- (1) In lieu of the statement in the articles of incorporation regarding the minimum consideration to be received for its shares before

commencing business, the restated charter shall set forth the then stated capital of the corporation;

- (2) In lieu of the address of the initial registered office and the name of the initial registered agent, the restated charter shall state the address of the then registered office and the name of its then registered agent.

(b) The restated charter shall also set forth that it purports merely to restate but not to change the provisions of the original articles of incorporation as supplemented and amended and that there is no discrepancy, other than as expressly permitted by this section, between the said provisions and the provisions of the restated charter.

(c) The restated charter shall be executed by the corporation and be filed as provided in G.S. 55-4.

(d) A copy of the restated charter certified by the Secretary of State shall be presumed, until otherwise shown, to be the full and true charter of the corporation as in effect on the date when so certified.

(e) A corporation may also integrate its articles of incorporation and all amendments thereto by the procedure provided in this Chapter for amending the charter. (1955, c. 1371, s. 1.)

§ 55-106. Procedure for merger.

(a) One or more domestic corporations may merge into another corporation, hereinafter designated as the surviving corporation, pursuant to a plan of merger approved in the manner provided in this Chapter. All corporations which are parties to such merger are hereinafter designated collectively as the constituent corporations.

(b) The board of directors of each constituent corporation shall by resolution adopted by each such board, approve a plan of merger setting forth:

- (1) The name of each constituent corporation, and a designation of which constituent corporation is to be the surviving corporation.
- (2) The name which the surviving corporation is to have after the merger, which name may be that of any of the constituent corporations or any other available name permitted by this Chapter.
- (3) The terms and conditions of the proposed merger.
- (4) The manner and basis of converting the shares of each of the constituent corporations into shares or other securities or obligations of the surviving corporation, and, if any shares of any of the constituent corporations are not to be converted solely into shares or other securities or obligations of the surviving corporation, the cash, property, rights or shares or other securities or obligations of any other corporation which the holders of such shares are entitled to receive in exchange for such shares or upon their conversion and the surrender of the certificates evidencing such shares, which cash, property, rights or shares or other securities or obligations of any other corporation may be in addition to or in lieu of the shares or securities or obligations of the surviving corporation; or, if any constituent corporation is the wholly owned subsidiary of the surviving corporation and no cash or shares or other securities or obligations will be distributed, or issued upon conversion or cancellation of the shares of any such constituent corporation, a statement to that effect.
- (5) A statement of any changes in the charter of the surviving corporation to be effected by such merger.
- (6) Such other provisions not inconsistent with law as are deemed necessary or desirable. (1925, c. 77, s. 1; 1939, c. 5; 1943, c. 270; G.S., s. 55-165; 1955, c. 1371, s. 1; 1969, c. 751, s. 37; 1973, c. 469, s. 31.)

Cross References. — As to shareholder approval of merger, see § 55-108. As to filing of articles of merger, see § 55-109.

CASE NOTES

Statute Controls as to Whether Merger or Consolidation. — Where two corporations enter into an agreement for their union and the continuation of business under the name of one

with the combined assets of both, the statute controls as to whether there is a merger or a consolidation. *Carolina Coach Co. v. Hartness*, 198 N.C. 524, 152 S.E. 489 (1930).

§ 55-107. Procedure for consolidation.

(a) Any two or more domestic corporations may consolidate into a new corporation pursuant to a plan of consolidation approved in the manner provided in this Chapter.

(b) The board of directors of each corporation shall, by resolution adopted by each such board, approve a plan of consolidation setting forth:

- (1) The names of the corporations proposing to consolidate, and the name of the new corporation into which they propose to consolidate, which is hereinafter designated as the new corporation. The name of the new corporation may be that of any of the corporations involved in the consolidation or any other available name permitted by this Chapter.
- (2) The terms and conditions of the proposed consolidation.
- (3) The manner and basis of converting the shares of each corporation into shares or other securities or obligations of the new corporation, and, if any shares of any consolidating corporation are not to be converted solely into shares or other securities or obligations of the new corporation, the cash, property, rights or shares or other securities or obligations of any other corporation which the holders of such shares are entitled to receive in exchange for such shares or upon their conversion and the surrender of the certificates evidencing such shares, which cash, property, rights or shares or other securities or obligations of any other corporation may be in addition to or in lieu of the shares or securities or obligations of the new corporation.
- (4) With respect to the new corporation, all of the statements required to be set forth in articles of incorporation for corporations organized under this Chapter, except the names and addresses of the incorporators.
- (5) Such other provisions not inconsistent with law as are deemed necessary or desirable. (1925, c. 77, s. 1; 1939, c. 5; 1943, c. 270; G.S., s. 55-165; 1955, c. 1371, s. 1; 1969, c. 751, s. 38; 1973, c. 469, s. 32.)

§ 55-108. Approval of merger or consolidation by shareholders.

(a) The board of directors of each corporation, upon approving such plan of merger or plan of consolidation, shall, by resolution, direct that the plan be submitted to a vote at a meeting of shareholders, which may be either an annual or a special meeting. Written or printed notice shall be given to each shareholder of record, not less than 20 days before such meeting, in the manner provided in this Chapter for the giving of notice of meetings of shareholders, and shall state this as a purpose of the meeting, whether the meeting be annual or a special meeting. A copy or a summary of the plan of merger or plan of consolidation, as the case may be, shall be included in or enclosed with such notice. Such notice shall contain a statement, displayed with reasonable promi-

nence, to the effect that dissenting shareholders are entitled, upon compliance with G.S. 55-113, including the 20-day notice requirement, to be paid for the fair value of their shares as provided in that section, but failure of the notice to contain such a statement shall not invalidate the merger or consolidation.

(b) At each such meeting, a vote of the shareholders shall be taken on the proposed plan of merger or consolidation. Each outstanding share of each such corporation shall be entitled to vote on the proposed plan of merger or consolidation, whether or not such share otherwise has voting rights. The plan of merger or consolidation shall be approved upon receiving the affirmative vote of the holders of at least a majority of the outstanding shares of each such corporation, unless any class of shares of any such corporation is entitled to vote as a class thereon, in which event, as to such corporation, the plan of merger or consolidation shall be approved upon receiving the affirmative vote of the holders of at least a majority of the outstanding shares of each class of shares entitled to vote as a class thereon and a majority of all the other outstanding shares. Any class of shares of any such corporation shall be entitled to vote as a class if the plan of merger or consolidation, as the case may be, contains any provision which, if contained in a proposed amendment to the charter, would entitle such class of shares to vote as a class; and if the plan of merger or consolidation contains any provisions which, if contained in a proposed amendment to the charter of a constituent corporation, would require by the express provisions of said charter a greater vote of its shareholders than is herein otherwise required for approval of a merger or consolidation, the said plan requires the approval of the thus prescribed greater vote of the shareholders of that corporation.

(c) After such approval by a vote of the shareholders of each corporation, and at any time prior to the filing of the articles of merger or consolidation, the merger or consolidation may be abandoned pursuant to provisions therefor, if any, set forth in the plan of merger or consolidation. (1925, c. 77, s. 1; 1939, c. 5; 1943, c. 270; G.S., s. 55-165; 1955, c. 1371, s. 1.)

§ 55-108.1. Mergers without approval of the shareholders of the surviving corporation.

(a) Unless otherwise provided in the charter or bylaws, no approval by shareholders of the surviving corporation shall be required for a merger if at the time of approval of the plan of merger by the board of directors of each of the corporations, domestic or foreign, who are parties thereto, the surviving corporation is the owner of all the outstanding shares of the other corporation, or corporations, domestic or foreign, who are parties to the merger, and the plan of merger does not provide for any changes in the charter of, or the issuance of any shares by, the surviving corporation.

(b) Unless otherwise provided in the charter or bylaws, no approval by shareholders of the surviving corporation shall be required for a merger if (i) the plan of merger does not provide for any changes in the charter of the surviving corporation, (ii) each share of the surviving corporation outstanding immediately prior to the merger becoming effective shall remain outstanding immediately after the merger as an identical share of the surviving corporation, and (iii) either no common shares of the surviving corporation and no shares, securities or obligations convertible into common shares are to be issued or delivered under the plan of merger, or the authorized unissued common shares or the treasury common shares of the surviving corporation to be issued or delivered under the plan of merger plus those initially issuable upon conversion of any other shares, securities or obligations to be issued or delivered under such plan do not exceed twenty percent (20%) of the common shares of the surviving corporation outstanding immediately prior to the effective date of the merger.

(c) In case of a merger under the provisions of this section, the articles of merger shall contain statements showing compliance with the conditions of this section, and, in lieu of statements required by G.S. 55-109(b) relating to the outstanding shares and the vote of shareholders of the surviving corporation, need only state the approval by its board of directors. (1955, c. 1371, s. 1; 1959, c. 1316, s. 37; 1973, c. 469, s. 33.)

§ 55-109. Articles of merger or of consolidation.

(a) After the approval by the directors and shareholders to the extent required by G.S. 55-108 and 55-108.1, articles of merger or of consolidation shall be executed by each corporation and be filed as provided in G.S. 55-4, except that a copy thereof certified by the Secretary of State shall also be recorded in the office of the register of deeds of each county wherein the constituent corporations have their registered offices. Certificates of merger or consolidation shall also be registered as provided in G.S. 47-18.1.

(b) The articles of merger or of consolidation shall set forth:

- (1) The plan of merger or the plan of consolidation.
- (2) As to each corporation, the number of shares outstanding, and, if the shares of any class are entitled to vote as a class, the designation and number of outstanding shares of each such class.
- (3) As to each corporation, the number of shares voted for and against such plan, respectively, and, if the shares of any class are entitled to vote as a class, the number of shares of each such class voted for and against such plan, respectively.

(c) The time when the merger or consolidation is effected is determined by the provisions of G.S. 55-4. (1925, c. 77, s. 1; 1939, c. 5; 1943, c. 270; G.S., s. 55-165; 1955, c. 1371, s. 1; 1967, c. 823, s. 18; 1973, c. 469, s. 34.)

§ 55-110. Effect of merger or consolidation.

(a) When such merger or consolidation has been effected:

- (1) The several corporations parties to the plan of merger or consolidation shall be a single corporation, which, in the case of a merger, shall be that corporation designated in the plan of merger as the surviving corporation, and, in the case of a consolidation, shall be the new corporation provided for in the plan of consolidation;
- (2) The separate existence of all corporations parties to the plan of merger or consolidation, except the surviving or new corporation, shall cease;
- (3) Such surviving or new corporation shall have all the rights, privileges, immunities and powers and shall be subject to all the duties and liabilities of a corporation organized under this Chapter.

(b) Such surviving or new corporation shall thereupon and thereafter, to the extent consistent with its charter as established or changed by the merger or consolidation, possess all the rights, privileges, immunities, and franchises, as well of a public as of a private nature, of each of the merging or consolidating corporations; and all property, real, personal and mixed, and all debts due on whatever account, and all other choses in action, and all and every other interest, of or belonging to or due to each of the corporations so merged or consolidated, shall be taken and deemed to be transferred to and vested in such single corporation without further act or deed; and the title to any real estate or any interest therein, vested in any of such corporations shall not revert or be in any way impaired by reason of such merger or consolidation. The provisions of this subsection are subject to the provisions of G.S. 47-18.1, with regard to the registration of certificates of merger or consolidation if the title to real property is affected.

(c) Such surviving or new corporation shall thenceforth be responsible and liable for all the liabilities, obligations and penalties of each of the corporations so merged or consolidated; and any claim existing or action or proceeding, civil or criminal, pending by or against any such corporations may be prosecuted as if such merger or consolidation had not taken place, or such surviving or new corporation may be substituted in its place; and any judgment rendered against any of the merged or consolidated corporations may be enforced against the surviving or new corporation. Neither the rights of creditors nor any liens upon the property of any merged or consolidated corporations shall be impaired by the merger or consolidation.

(d) In the case of a merger, the charter of the surviving corporation shall be deemed to be amended to the extent, if any, that changes in its charter are stated in the plan of merger. In the case of a consolidation, the articles of consolidation shall be deemed to be the articles of incorporation of the new corporation. (1925, c. 77, s. 1; 1943, c. 270; G.S., s. 55-166; 1955, c. 1371, s. 1; 1967, c. 950, s. 1.)

CASE NOTES

Merger does not create new or additional rights. The surviving corporation is vested with all the rights which each party to the merger could exercise but only those rights. *Good Will Distribs. (N.), Inc. v. Shaw*, 247 N.C. 157, 100 S.E.2d 334 (1957), construing former § 55-166.

Surviving Corporation Succeeds by Operation of Law. — In the event of a merger between corporations, the surviving corporation succeeds by operation of law to all of the rights, privileges, immunities, franchises and other property of the constituent corporations, without the necessity of a deed, bill of sale, or other form of assignment. *Econo-Travel Motor Hotel Corp. v. Taylor*, 301 N.C. 200, 271 S.E.2d 54 (1980).

Application of Statute of Limitations against Surviving Corporation. — The six-year statute of limitations of § 1-50 did not apply to an action for fraud arising out of the collapse of the floor of a building where the corporate tenant of the building merged into the corporate plaintiff after the building collapsed. Since the plaintiff succeeded to the rights of the corporate tenant and thus was in possession of the building as tenant at the time of the injury, it came within the exception under § 1-50(5). *Feibus & Co. v. Godley Constr. Co.*, 301 N.C. 294, 271 S.E.2d 385 (1980), rehearing denied, 301 N.C. 727, 274 S.E.2d 228 (1981).

§ 55-111. Merger or consolidation of domestic and foreign corporations.

(a) One or more foreign corporations and one or more domestic corporations may be merged or consolidated into a corporation of this State or of another state if such merger or consolidation is permitted by the laws of the state under which each such foreign corporation is organized.

(b) Each domestic corporation shall comply with the provisions of this Chapter with respect to the merger or consolidation, as the case may be, of domestic corporations and each foreign corporation shall comply with the applicable provisions of the laws of the state under which it is organized.

(c) If the surviving or new corporation, as the case may be, is a corporation of any state other than this State, it shall comply with the provisions of this Chapter with respect to foreign corporations if it is to transact business in this State; and, if after the merger or consolidation it transacts no business in this State, the courts of this State shall have jurisdiction in actions to enforce any obligation of any constituent corporation of this State arising out of the merger or consolidation or out of any act or omission of such constituent corporation prior to or contemporaneous with the merger or consolidation, and process therein may be served as provided in G.S. 55-146 or 55-146.1.

(d) The effect of such merger or consolidation shall be the same as in the case of the merger or consolidation of domestic corporations, if the surviving or new corporation is to be a corporation of this State. If the surviving or new corporation is to be a corporation of any state other than this State, the effect of such merger or consolidation shall be the same as in the case of the merger or consolidation of domestic corporations except insofar as the laws of such other state provide otherwise.

(e) If the new or surviving corporation is not a corporation in this State, then notwithstanding anything in the foregoing provisions of this section:

- (1) The rights of any holder of shares in any constituent corporation that is a corporation of this State to receive notice of dissenters' rights, to file his dissent, upon dissent to demand and receive payment of the fair value of his shares or to avail himself of any equitable relief to which he would be entitled if the surviving or new corporation were a corporation of this State shall not be impaired, and
- (2) The courts of this State shall have jurisdiction in actions to enforce the aforesaid rights against the surviving or new corporation regardless of whether or not said corporation is otherwise subject to the jurisdiction of the courts of this State and in any such action service of process may be made in the manner provided in this Chapter that would be applicable if said corporation were transacting business in this State. (1925, c. 77, s. 1; 1939, c. 5; 1943, c. 270; G.S., s. 55-165; 1955, c. 1371, s. 1; 1973, c. 469, s. 35.)

§ 55-112. Sale, lease, exchange and mortgage of assets.

(a) A mortgage of or other security interest in all or any part of the property of a corporation may be made by authority of the board of directors without authorization of the shareholders, unless otherwise provided in the charter or in bylaws adopted by the shareholders.

(b) Unless otherwise provided in the charter or in the bylaws adopted by the shareholders, a sale, lease or exchange of all or substantially all the property and assets of a corporation, not made for shares of the purchasing corporation, foreign or domestic, whether in a single transaction or a series of transactions, may be made by the board of directors without authorization from the shareholders if:

- (1) In the judgment of the board of directors the corporation is in a failing condition and a sale for cash or its equivalent is deemed by them advisable in meeting the liabilities of the corporation, or
- (2) The corporation was incorporated for the purpose of liquidating such property and assets, or
- (3) The sale, lease or exchange is not made to terminate or dispose of the business in which the corporation was organized to engage, but merely as a transaction or one of a series of transactions, whether usual or unusual, to further the said business.

(c) Any other sale (whether for cash or for securities of the purchasing corporation or otherwise), or any other lease or exchange of all or substantially all the property of a corporation requires approval of the shareholders in the following manner:

- (1) The board of directors shall adopt a resolution recommending such sale, lease or exchange and directing the submission thereof to a vote at a meeting of shareholders, which may be either an annual or a special meeting.
- (2) Written notice shall be given to each shareholder of record entitled to vote at such meeting within the time and in the manner provided in this Chapter for the giving of notice of meetings of shareholders, and, whether the meeting be an annual or a special meeting, shall state

that the purpose or one of the purposes of such meeting is to consider the proposed sale, lease or exchange. If the sale, lease or exchange would give rise to a dissenter's right of payment for his shares under this Chapter, such notice shall contain a statement, displayed with reasonable prominence, to the effect that the dissenting shareholders are entitled, upon compliance with G.S. 55-113, including the 20-day notice requirement, to be paid the fair value of their shares as therein provided, but failure of the notice to contain such a statement shall not invalidate the sale, lease or exchange.

- (3) At such meeting the shareholders may authorize such sale, lease or exchange and may fix, or may authorize the board of directors to fix, any or all of the terms and conditions thereof and the consideration to be received by the corporation therefor. Each outstanding share of the corporation shall be entitled to vote thereon, whether or not otherwise entitled to vote. Such authorization shall require the affirmative vote of at least two thirds of the outstanding shares of the corporation, unless any class of shares is entitled to vote as a class thereon, in which event such authorization shall require the affirmative vote of at least two thirds of the outstanding shares of each class of shares entitled to vote as a class thereon and two thirds of all other outstanding shares. Any class of shares shall be entitled to vote as a class if the sale, lease or exchange is for securities of another corporation, foreign or domestic, and such sale, lease or exchange is part of a plan of distribution of such securities that would effectuate such changes in that class of shares as would entitle those shares to vote as a class if the changes were contained in a proposed amendment to the charter.

(d) The board of directors may, if so empowered by such authorization of the shareholders, abandon such sale, lease or exchange, subject to the rights of third parties under any contracts relating thereto, without further action or approval by shareholders. (1925, c. 235; 1929, c. 269; 1939, c. 279; G.S., s. 55-26; 1955, c. 1371, s. 1.)

Legal Periodicals. — For comment on the disposition of corporate assets, see 43 N.C.L. Rev. 957 (1965).

CASE NOTES

Noncompliance with Section Is Breach of Duty. — Failure to conform to the mandates of this section constitutes a breach of a director's fiduciary duty as well as a breach of the major-

ity stockholders' duty to the minority. *Loy v. Lorm Corp.*, 52 N.C. App. 428, 278 S.E.2d 897 (1981).

§ 55-113. Rights of objecting shareholders upon fundamental changes and certain exchanges of shares.

(a) As used in this section:

- (1) "Sale of assets for shares" means a sale, exchange or other disposition of all, or substantially all, the property and assets of a corporation, if made for, or substantially for, shares of another corporation, foreign or domestic.
- (2) "Corporation" includes, if the context so indicates, the successor corporation which acquires the property of the predecessor corporation upon merger, consolidation or sale of assets for shares.

- (3) With respect to offers of exchange of shares which entitle the preferred shareholders designated in G.S. 55-102 to rights under this section, the term "effective date of the exchange" means the date on which the corporation first actually consummated such an exchange of shares or, in case it reserved the right to postpone the operation or effectiveness of all acceptances of its offer of exchange, the date on which it declared the acceptance operative or effective.

(b) Any shareholder designated in G.S. 55-101(b) as having rights under this section in connection with amendment of the charter or designated in G.S. 55-119(b) as having rights under this section in connection with dissolution and liquidation of assets in kind, or any shareholder of a corporation effecting a merger, consolidation or sale of assets for shares may give to the corporation, prior to or at the meeting of the shareholders to which the proposal of amendment, dissolution, merger, consolidation or sale of assets for shares is submitted to a vote, written notice that he objects to such proposal. Within 20 days after the date on which the vote was taken, such shareholder may, unless he voted in person or by proxy in favor of the proposal, make written demand on the corporation for payment of the fair value of his shares. Such demand shall state the number and class of shares owned by him. In addition to any other right he may have in law or equity, a shareholder giving such notice shall be entitled, if and when the amendment, dissolution, merger, consolidation or sale of assets for shares is effected, to be paid by the corporation the fair value of his shares, as of the day prior to the date on which the vote was taken, subject only to the surrender by him of the certificate representing his shares.

(c) Any holder of preferred shares designated in G.S. 55-102 as having a right to payment for his shares in connection with an offer of exchange of securities may, within 20 days after the date when the offer was mailed or otherwise reasonably dispatched to him, give to the corporation written notice that he objects to the terms of said offer of exchange and that he demands payment for his shares. Such notice shall state the number and class of shares owned by him. Twenty days after the effective date of the exchange or 20 days after the date of mailing or otherwise reasonably dispatching such notice, whichever date is later, a shareholder giving such notice shall, in addition to any other right he may have in law or equity, be entitled to be paid by the corporation the fair value of his shares as of the day preceding the mailing or otherwise reasonably dispatching of the notice, unless all exchange or agreements to exchange theretofore made shall have been rescinded within the applicable 20-day period above mentioned, subject only to the surrender by him of his certificate representing his shares.

(d) If within 30 days after the date upon which the objecting shareholder becomes entitled to payment of his shares under subsections (b) and (c) of this section the value of the shares is agreed upon between the shareholder and the corporation, payment therefor shall be made within 60 days after the agreement, upon surrender of the certificate representing the shares, whereupon the shareholder shall cease to have any interest in such shares or in the corporation.

(e) If within the 30-day period mentioned in subsection (d) of this section the shareholder and the corporation do not agree as to the value of the shares the shareholder may, within 60 days after the expiration of the 30-day period, file a petition in the superior court of the county of the registered office of the corporation asking for the appointment by the clerk of three qualified and disinterested appraisers to appraise the fair value of the shares. A summons as in other cases of special proceedings, together with a copy of the petition, shall be served on the corporation at least 10 days prior to the hearing of the petition by the court. The award of the appraisers, or a majority of them, if no exceptions be filed thereto within 10 days after the award shall have been filed in court, shall be confirmed by the court, and when confirmed shall be final and

conclusive, and the shareholder upon depositing the proper share certificates in court, shall be entitled to judgment against the corporation for the appraised value thereof as of the date prescribed in this section, together with interest thereon to the date of such confirmation. If either party files exceptions to such award within 10 days after the award shall have been filed in court, the case shall be transferred to the civil issue docket of the superior court for trial during term and shall be there tried in the same manner, as near as may be practicable, as is provided in Chapter 40 for the trial of cases under the eminent domain law of this State, and with the same right of appeal as is permitted in said Chapter. The court shall assess the cost of said proceedings as it shall deem equitable. The fair value of any shares entitled to preference on liquidation shall in no event be found to be less than two thirds of the amount of the preference to which said shares would have been entitled on a voluntary liquidation on the date herein prescribed for determining fair value if under the corporate change giving rise to the preferred shareholder's rights of payment any shares junior thereto retain a participation in the corporation without payment for such retention, or if the participation received by them upon any payment for such retention is found to exceed in value the amount of the said payment. Upon payment of the judgment the shareholder shall cease to have any interest in the shares or in the corporation and the corporation shall be entitled to have said share certificates surrendered to it by the clerk of court for cancellation. Unless the shareholder shall file such petition within the time herein prescribed, he and all persons claiming under him shall have no right of payment hereunder but in that event nothing herein shall impair his status as shareholder.

(f) If in the notices sent to shareholders in connection with the meeting to vote upon a proposed amendment of the charter, dissolution, merger, consolidation or sale of assets for shares or if in the offer of exchange of securities described in G.S. 55-102 no reference is made as required by this Chapter to the provisions of this section, any shareholder entitled to but who did not avail himself of the provisions of this section, unless he voted for the proposal or accepted the offer of exchange of securities, is entitled, if he so demands in writing within one year after the effective date of the amendment, dissolution, merger, consolidation, sale of assets for shares or exchange of securities in question, to recover from the corporation any damage which he suffered from failure of the corporation to make the aforesaid reference.

(g) The liability to pay for shares or to pay damages imposed by this section on a corporation extends to the successor corporation which acquires the assets of the predecessor, whether by merger, consolidation or sale of assets for shares.

(h) Shares acquired by a corporation pursuant to payment of the agreed value thereof or to payment of the judgment entered therefor, as in this section provided, may be held and disposed of by the corporation as in the case of other treasury shares.

(i) The provisions of this section shall not apply to a merger if on the date of the filing of the articles of merger the surviving corporation is the owner of all the outstanding shares of the other corporation or corporations, domestic or foreign, participating in the merger and if such merger makes no changes in the relative rights of the shareholders of the surviving corporation. The provisions of this section shall also not apply to the shareholders of the surviving corporation if their approval of the merger is not required, as provided in G.S. 55-108.1(b).

(j) A shareholder may not exercise his rights under this section as to less than all of the shares owned beneficially by him and with respect to which such rights exist. A nominee or fiduciary may not dissent on behalf of any beneficial owner as to less than all of the shares of such owner with respect to which the right of dissent exists. (1925, c. 77, s. 1; 1943, c. 270; G.S., s. 55-167; 1955, c. 1371, s. 1; 1969, c. 751, s. 39; 1973, c. 469, ss. 36, 37.)

Editor's Note. — Chapter 40, referred to in this section, was repealed by Session Laws 1981, c. 919. See now Chapter 40A.

Legal Periodicals. — For note as to bad faith of the majority in close corporations, see 35 N.C.L. Rev. 271 (1957).

CASE NOTES

Applied in *Jackson v. Stanwood Corp.*, 38 N.C. App. 479, 248 S.E.2d 576 (1978).

§ 55-113.1. Fundamental changes in reorganization proceedings.

(a) Whenever a plan of reorganization of a corporation has been or shall be confirmed by decree or order of a court of competent jurisdiction in proceedings for the reorganization of such corporation pursuant to the provisions of any applicable statute of the United States relating to reorganizations of corporations, the corporation may put into effect and carry out such plan and the decrees and orders of the court relative thereto and may take any proceeding and do any act provided in such plan or directed by such decrees and orders without further action by its directors or shareholders. Such action may be taken, as may be directed by such decrees or orders, by the trustee or trustees of such corporation appointed in the reorganization proceedings, or by designated officers of the corporation, or by a master or other representative appointed by the court, with like effect as if taken by unanimous action of the directors and shareholders of the corporation. In particular and without limiting the generality or effect of the foregoing, such corporation may:

- (1) Amend its charter or bylaws, or both, so long as the charter and bylaws as amended contain only such provisions as might be lawfully contained therein at the time of making such amendment;
- (2) Constitute or reconstitute and classify or reclassify its board of directors, and name, constitute or appoint directors and officers in place of or in addition to all or any of the directors or officers then in office;
- (3) Make any change in its stated capital or surplus or in any or all of its outstanding shares or other securities, or cancel any or all of such outstanding shares or other securities;
- (4) Dissolve and liquidate;
- (5) Merge or consolidate;
- (6) Transfer all or part of its assets;
- (7) Change its registered office or registered agent, or both;
- (8) Authorize the issuance of bonds, debentures or other obligations of the corporation, whether or not convertible into shares of any class or bearing warrants or other evidences of optional rights to purchase or subscribe for shares of any class, and fix the terms and conditions thereof.

(b) Any articles of amendment, statement of classification of shares, statement of change or registered office and registered agent, certificate of reduction of capital, restated charter, articles of merger, articles of consolidation, articles of dissolution, statement of revocation of dissolution, certificate of completed liquidation, or any other document appropriate to complete any action permitted by this section shall be executed and filed in accordance with the provisions of this Chapter on behalf of the corporation by such person or persons as may be authorized to take such action pursuant to subsection (a).

(c) No action taken under this section shall give rise to any rights under G.S. 55-113, except as provided in the plan of reorganization.

(d) No action authorized by this section shall be taken after the entry of a final decree in the reorganization proceedings closing the case and discharging the trustee or trustees, if any. (1973, c. 469, s. 38.)

ARTICLE 9.

Dissolution and Liquidation.

§ 55-114. Dissolution and its effect.

(a) A corporation may be dissolved in any of the following ways:

- (1) Upon expiration of any period of duration to which the corporation is limited by its charter, by executing and filing in the office of the Secretary of State in accordance with the provisions of G.S. 55-4 articles of dissolution setting forth (i) the name of the corporation, (ii) the names and respective addresses of its officers and directors, and (iii) a statement of the expiration date presently contained in its charter;
- (2) By filing in the office of the Secretary of State articles of dissolution in voluntary proceedings for dissolution as prescribed in G.S. 55-116, 55-117 and 55-118;
- (3) By entry of a decree of dissolution by the superior court in involuntary proceedings for dissolution by the Attorney General, as prescribed in G.S. 55-122, or in proceedings to liquidate the assets and business of the corporation, as described in G.S. 55-125;
- (4) By suspension of its charter under the provisions of G.S. 105-230 when the time within which the corporation's rights might be restored under G.S. 105-232 has expired; however, the provisions for liquidation of corporate assets in such cases shall be those provided in G.S. 105-232 instead of those provided in this Chapter.

(b) A dissolved corporation, however dissolved, nevertheless continues to exist for the purpose of winding up its affairs, prosecuting and defending actions by or against it, and enabling it to collect and discharge obligations, dispose of and convey its property, and collect and distribute its assets, but not for the purpose of continuing business except so far as necessary for winding up its affairs or except where G.S. 55-115 applies. Title to property of a dissolved corporation does not by reason of dissolution vest in its shareholders.

(c) After the end of the tax year in which dissolution occurs a dissolved corporation is not subject to the annual franchise tax unless it engages in business activities not reasonably incidental to winding up its affairs.

(d) The dissolution of a corporation shall not take away or impair any remedy available to or against such corporation for any right or claim, not covered by subsection (f) of this section, existing or for any liability incurred prior to such dissolution if the action or proceeding is commenced within two years after the filing of a certificate of completed liquidation, and the plaintiff or petitioner must allege and prove that the action or proceeding is commenced within such period. Nothing herein shall extend any applicable period of limitation. No action or proceeding, civil or criminal, to which a corporation is a party shall abate by reason of such dissolution or filing. Any action or proceeding by or against a dissolved corporation may be prosecuted or defended by the corporation in its corporate name, and such use of the corporate name is also available to a shareholder prosecuting or defending in a derivative capacity on behalf of a dissolved corporation.

(e) A corporation dissolved under this or any prior act shall have the power to maintain, or to reestablish after failure to maintain, a board of directors and officers to wind up its affairs, and its shareholders, directors and officers shall have the power to take corporate action appropriate to that end.

(f) Even after the filing of a certificate of completed liquidation or the entry of a court order declaring liquidation completed, title to any corporate assets inadvertently omitted from a liquidation purportedly completed shall remain in the corporation and, for the purpose of administering or liquidating any such assets or determining the corporation's interest therein, the dissolved corporation shall have power to sue and defend in legal actions or proceedings and fully to act in its corporate name through either its board of directors and officers maintained or reestablished as permitted in this section or through a majority of the last board of directors then living, however reduced in numbers, acting either directly themselves or through the last officers of the corporation. (1955, c. 1371, s. 1; 1973, c. 469, ss. 39, 40.)

CASE NOTES

Effect of Dissolution on Pending Action.

— Where a corporation has been served with summons and has filed answer, the action against it does not abate upon its subsequent dissolution. *Lertz v. Hughes Bros.*, 208 N.C. 490, 181 S.E. 342 (1935).

Effect of Temporary Suspension of Charter under § 105-230. — Allegations in the complaint to the effect that plaintiff corporation's charter was temporarily suspended under § 105-230 less than a year prior to the institution of the action do not disclose that the corporation did not have legal capacity to institute the action. *Mica Indus., Inc. v. Penland*, 249 N.C. 602, 107 S.E.2d 120 (1959).

Failure to Reinstate Suspended Charter.

— When a corporation's charter is suspended pursuant to § 105-230, the same may be rein-

stated within five years upon payment of fees and taxes due the Revenue Department; and if the charter is not so reinstated within five years, then liquidation of corporate assets is as provided in § 105-232 rather than § 55-114 et seq. *Raleigh Swimming Pool Co. v. Wake Forest County Club*, 11 N.C. App. 715, 182 S.E.2d 273 (1971).

Standing to Maintain Action on Contract Where Articles Suspended.

— A corporation whose articles of incorporation were suspended under § 105-230 for failure to pay taxes had standing under subsection (b) of this section to maintain an action to recover the amount due on a contract. *Raleigh Swimming Pool Co. v. Wake Forest Country Club*, 11 N.C. App. 715, 182 S.E.2d 273 (1971).

§ 55-115. Extension of duration after expiration.

(a) If a corporation has continued to conduct its business after the expiration of its charter, it may at any time amend its charter so as to extend or perpetuate its period of existence. Expiration of a charter does not of itself create any vested right on the part of any shareholder or creditor to prevent such charter amendment.

(b) No acts or contracts of a corporation during the period within which it could have extended its existence as permitted in this section, whether or not it has taken action so to extend its existence, shall be in any degree invalidated by the expiration of the charter. (1929, c. 271; 1935, c. 6; G.S., s. 55-32; 1955, c. 1371, s. 1.)

CASE NOTES

Cited in *Raleigh Swimming Pool Co. v. Wake Forest County Club*, 11 N.C. App. 715, 182 S.E.2d 273 (1971).

§ 55-116. Voluntary dissolution by directors.

(a) A corporation may be voluntarily dissolved by majority vote of the directors then in office in the following cases:

- (1) When the corporation has not commenced business and has not received any payment on any subscription to its shares.
- (2) When a corporation has been adjudged to be bankrupt.
- (3) When a corporation has made a general assignment for the benefit of creditors.
- (4) By leave of court, when a receiver has been appointed in any suit in which the affairs of the corporation are to be wound up.
- (5) When substantially all of the assets have been sold at judicial sale or have been sold for the purpose of terminating the business of the corporation.

(b) To effectuate dissolution under this section, articles of dissolution shall be executed by a majority of the directors then in office and shall be filed, in accordance with the provisions of G.S. 55-4, setting forth:

- (1) The name of the corporation.
- (2) The names and respective addresses of its officers, if any.
- (3) The names and respective addresses of its directors.
- (4) A statement showing one or more of the grounds of voluntary dissolution mentioned in subdivisions (1) to (5), inclusive, of subsection (a) of this section.
- (5) That a majority of the directors have determined by majority vote to dissolve the corporation. (1955, c. 1371, s. 1.)

CASE NOTES

Cited in *J.G. Dudley Co. v. Commissioner*,
298 F.2d 750 (4th Cir. 1962).

§ 55-117. Voluntary dissolution by written consent of shareholders.

A corporation may be voluntarily dissolved pursuant to the written consent of all of its shareholders. No meeting or notice of meeting is necessary. To effectuate such dissolution, articles of dissolution shall be executed by the corporation and shall be filed, in accordance with the provisions of G.S. 55-4, setting forth:

- (1) The name of the corporation.
- (2) The names and respective addresses of its officers.
- (3) The names and respective addresses of its directors.
- (4) A statement that written consent to the dissolution of the corporation has been signed by all shareholders of the corporation or signed in their names by their attorneys thereunto duly authorized, which statement shall have attached thereto such written consent duly signed. (1901, c. 2, s. 34; Rev., s. 1195; C.S., s. 1182; 1941, c. 195; G.S., s. 55-121; 1951, c. 1005, s. 4; 1955, c. 1371, s. 1.)

CASE NOTES

Section Settles Question as to When Dissolution Allowed. — Former § 55-121 settled the question as to whether, and under what cir-

cumstances, a corporation could be dissolved by the stockholders, when no time was fixed for its duration, upholding and extending this power

of voluntary dissolution as established by the better considered decisions on the subject. *White v. Kincaid*, 149 N.C. 415, 63 S.E. 109 (1908).

§ 55-118. Voluntary dissolution by action of directors and shareholders.

(a) A corporation may be voluntarily dissolved by action of the directors and shareholders in the following manner:

- (1) The board of directors shall adopt a resolution recommending that the corporation be dissolved, and directing that the question of such dissolution be submitted to a vote at a meeting of shareholders, which may be either an annual or a special meeting.
- (2) Written or printed notice shall be given to each shareholder of record within the time and in the manner provided in this Chapter for giving of notice of meeting of shareholders, and, whether the meeting be an annual or special meeting, shall state that the purpose or one of the purposes is to consider the advisability of dissolving the corporation. If the proposal to dissolve contemplates a plan of liquidation whereby substantially all the assets distributable to the shareholders are to be conveyed, transferred, or assigned to them collectively as co-owners, the notice shall so inform the shareholders and shall contain a statement displayed with reasonable prominence to the effect that dissenting shareholders are entitled, upon compliance with G.S. 55-113, to be paid the fair value of their shares as provided in that section, but failure of the notice to contain such a statement shall not invalidate the dissolution.
- (3) At such meeting a vote may be taken on any resolution to dissolve the corporation. Each outstanding share of the corporation shall be entitled to vote thereon, whether or not otherwise entitled to vote. Such resolution shall be adopted upon receiving the affirmative vote of at least two thirds of the outstanding shares of the corporation, unless any class of shares is entitled to vote as a class thereon, in which event the resolution shall require for its adoption the affirmative vote of at least two thirds of the outstanding shares of each class of shares entitled to vote as a class thereon and of two thirds of the other outstanding shares.

(b) To effectuate such dissolution, articles of dissolution shall be executed by the corporation and shall be filed, in accordance with the provisions of G.S. 55-4, setting forth:

- (1) The name of the corporation.
- (2) The names and respective addresses of its officers.
- (3) The names and respective addresses of its directors.
- (4) A copy of the resolution adopted by the shareholders authorizing the dissolution of the corporation.
- (5) The number of shares outstanding, and, if the shares of any class are entitled to vote as a class, the designation and number of outstanding shares of each such class.
- (6) The number of shares voted for and against the resolution, respectively, and, if the shares of any class are entitled to vote as a class, the number of shares of each such class and of the other outstanding shares voted for and against the resolution, respectively. (1901, c. 2, s. 34; Rev., s. 1195; C.S., s. 1182; 1941, c. 195; G.S., s. 55-121; 1951, c. 1005, s. 4; 1955, c. 1371, s. 1.)

CASE NOTES

Editor's Note. — The cases cited below were decided under former statutory provisions.

Section Settles Question as to When Dissolution Allowed. — Former § 55-121 settled the question formerly much mooted in the courts as to whether, and under what circumstances, a corporation could be dissolved by the stockholders, when no time was fixed for its duration, upholding and extending this power of voluntary dissolution as established by the better considered decisions on the subject. *White v. Kincaid*, 149 N.C. 415, 63 S.E. 109 (1908).

Part of Every Charter. — The provision of the statute enters into every charter, and unless otherwise enacted by the legislature, every stockholder takes and holds his stock subject to the power of voluntary dissolution, by resolution of the directors concurred in by two thirds in interest of the stockholders. *White v. Kincaid*, 149 N.C. 415, 63 S.E. 109 (1908).

Directors Are Trustees in Dissolution Proceedings. — The directors of a corporation in proceedings for dissolution are trustees in the sense that they must act faithfully in their judgment for the benefit of the corporation and in furtherance of its interest, and not for the purpose of unjustly oppressing the holders of the minority stock, or to attain their own personal ends. *White v. Kincaid*, 149 N.C. 415, 63 S.E. 109 (1908).

Motive for Dissolution Generally Immaterial. — When a corporation lawfully proceeds to wind up its affairs in accordance with the statute, the motive prompting the act, however reprehensible or malicious, is not, as a rule, relevant to the inquiry; and the courts will not undertake to interfere with the honest exercise of discretionary powers vested by statute in the management of a corporation, however unwise or improvident it may seem in a given instance. *White v. Kincaid*, 149 N.C. 415, 63 S.E. 109 (1908).

Liquidation to Escape Judgment. — An attempted liquidation by a corporation, to escape judgment for the refund of money wrongfully distributed, is in fraud of creditors. *Chatham v. Mecklenburg Realty Co.*, 180 N.C. 500, 105 S.E. 329 (1920).

Suits Pending Dissolution. — Where it appears in an action that the indebtedness sought to be recovered was claimed to be due a corporation, and that the suit was instituted by the individual stockholders, a judgment as of nonsuit is properly entered, though proceedings in dissolution of the corporation were being had under the statute, the proper party plaintiff being the corporation or a receiver appointed therefor. *Worthington v. Gilmers, Inc.*, 190 N.C. 128, 129 S.E. 153 (1925).

§ 55-119. Procedure after filing articles of dissolution.

(a) After the filing of articles of dissolution in the office of the Secretary of State, the corporation shall, except in case of dissolution under G.S. 55-116(a)(2), (3) and (4), immediately cause notice of the dissolution to be mailed to each known creditor of the corporation, and to the Secretary of Revenue, and such notice shall be published once a week for four successive weeks in a newspaper published in the county wherein the corporation has its registered office, and, if there be no newspaper published in such county, then in some newspaper of general circulation in such county. The corporation shall then proceed to collect its assets, convey and dispose of such of its properties as are not to be distributed in kind to its shareholders, pay, satisfy and discharge its liabilities and obligations and do all other acts required to liquidate its business and affairs, including the collection of unpaid subscriptions necessary to equalize the agreed payments by subscribers of its shares. After paying or adequately providing for the payment of all its obligations, the corporation shall distribute the remainder of its assets, either in cash or in kind, among its shareholders according to their respective rights and interests.

(b) If liquidation is effected by transfer of assets in kind to the shareholders collectively as co-owners, an objecting shareholder so demanding is entitled to be paid the fair value of his shares or damages in accordance with the provisions of G.S. 55-113. (1955, c. 1371, s. 1; 1973, c. 476, s. 193.)

CASE NOTES

Editor's Note. — The cases cited below were decided under the former statute relating to the distribution of funds upon the dissolution of a corporation.

Property Does Not Revert or Escheat. — Upon the dissolution or extinction of a corporation for any cause, the real property conveyed to it in fee does not revert to the original grantors or their heirs, and its personal property does not escheat to the State; and this is so whether or not the duration of the corporation was limited by its charter or general statute. *Wilson v. Leary*, 120 N.C. 90, 26 S.E. 630 (1897).

How Assets Distributed. — When the receiver has collected the assets he is required to pay all the debts, if the funds are sufficient, and, if the funds are not sufficient, to distribute the same ratably, among all the creditors who prove their claims. When the court of equity, through its receiver, takes charge of the assets, they are to be distributed pro rata among the creditors, subject to such priorities as have already accrued. *Merchants Nat'l Bank v.*

Newton Cotton Mills, 115 N.C. 507, 20 S.E. 765 (1894).

Creditors Come before Stockholders. — A corporation cannot settle with its members, by the application of assets to the retirement or redemption of the stock of the shareholders, until it has first settled and discharged all its liabilities, and any agreement among the shareholders looking to such arrangement will be void as to creditors. *Heggie v. People's Bldg. & Loan Ass'n*, 107 N.C. 581, 12 S.E. 275 (1890).

When Bondholders Are General Creditors. — Where payment of interest on bonds issued to preferred stockholders in reorganization of corporation was not restricted to payment out of earnings, but on the contrary the obligation was fixed and certain in the payment of interest out of assets of the corporation, this made and constituted the holders of such bonds under North Carolina statutory law general creditors. *Bemis Hardwood Lumber Co. v. United States*, 117 F. Supp. 851 (W.D.N.C. 1954).

§ 55-120. Revocation and cancellation of voluntary dissolution proceedings.

(a) At any time after the filing of articles of dissolution and prior to the filing of a certificate of completed liquidation, a dissolution effected under G.S. 55-116, 55-117 or 55-118 may be revoked by the filing of a statement of revocation of dissolution. The contents of such a statement and the proceedings taken so as to revoke a dissolution shall conform with such adaptations as are appropriate to revocation to either (i) those prescribed in the section under which the dissolution was effected, or (ii) those prescribed in G.S. 55-117 or 55-118.

(b) Upon the filing of such statement of revocation of dissolution in the office of the Secretary of State, the revocation of the voluntary dissolution proceedings shall become effective and the corporation may again carry on business.

(c) If a dissolution has been effected by the filing of articles of dissolution containing false statements of facts which if truthfully stated would not have met the requirements of this Chapter for a dissolution, any shareholder may maintain an action to cancel the said articles of dissolution and to restore the charter of the corporation unless liquidation has theretofore proceeded so far as to make such cancellation and restoration impracticable. Such action shall be brought in the county in which the corporation has its registered office or its principal place of business. Upon the filing in the office of the Secretary of State of a decree of cancellation of said articles of dissolution, the corporation's charter and its right to do business thereunder shall be thereby restored. (1955, c. 1371, s. 1.)

§ 55-121. Completion of liquidation in voluntary dissolution proceedings.

(a) When all liabilities and obligations of a dissolved corporation have been paid and discharged, or adequate provision has been made therefor, and all of the remaining property and assets of the corporation have been distributed to its shareholders pursuant to G.S. 55-119, a certificate of completed liquidation shall be executed by the corporation and shall be filed in accordance with the provisions of G.S. 55-4, setting forth:

- (1) The name of the corporation.
- (2) That articles of dissolution have theretofore been filed in the office of the Secretary of State, the date on which articles were filed, and that the dissolution thereby effected has not been revoked.
- (3) That all liabilities and obligations of the corporation have been paid and discharged or that adequate provision has been made therefor.
- (4) That the remaining property and assets of the corporation have been distributed among its shareholders in accordance with their respective rights and interests.

(b) Upon the filing of such certificate in the office of the Secretary of State in accordance with G.S. 55-4, the existence of the corporation shall cease except as otherwise provided in this Article.

(c) The Secretary of State shall not file the certificate of completed liquidation until the receipt by him of a notice from the Secretary of Revenue to the effect that such corporation has met the requirements with respect to reports and taxes required by the revenue laws of the State of North Carolina. (1901, c. 2, s. 34; Rev., s. 1195; C.S., s. 1182; 1941, c. 195; G.S., s. 55-121; 1951, c. 1005, s. 4; 1955, c. 1371, s. 1; 1973, c. 476, s. 193.)

§ 55-122. Involuntary dissolution in action by Attorney General.

A corporation may be dissolved involuntarily by a decree of the superior court in an action brought by the Attorney General in the name of the State when it is established that:

- (1) The charter of the corporation was procured through fraud; or
- (2) The corporation has without justification refused to comply with a final court order for the production of its books, records, or other documents as provided in G.S. 55-38; or
- (3) The corporation has, after written notice by the Attorney General given at least 20 days prior thereto, continued to exceed or abuse the authority conferred upon it by law to the injury of the public or of its shareholders, creditors, or debtors; or
- (4) The corporation has, after written notice by the Attorney General given at least 20 days prior thereto, failed for 30 days to meet the requirements of G.S. 55-13 with respect to appointing and maintaining a registered agent in this State; or
- (5) The corporation has, after written notice by the Attorney General given at least 20 days prior thereto, failed for 30 days after change of its registered office or registered agent to file in the office of the Secretary of State the statement required by G.S. 55-14. (Code, ss. 604, 605, 694; 1889, c. 533; 1901, c. 2, s. 73; Rev., ss. 1196, 1198; C.S., ss. 1185, 1187; G.S., ss. 55-124, 55-126; 1955, c. 1371, s. 1.)

CASE NOTES

Cited in *Starbuck v. Town of Havelock*, 252 N.C. 176, 113 S.E.2d 278 (1960).

§ 55-123. Duties of Attorney General with respect to actions for involuntary dissolution.

Whenever the Attorney General has reason to believe that any corporation has given cause for dissolution as provided in G.S. 55-122 and the case involves the public interest, it is the duty of the Attorney General to bring an action under that section. If the cause for dissolution does not involve the public interest, the Attorney General has a duty to bring an action if satisfactory security is given to indemnify the State against the costs and expenses to be incurred thereby. (Code, s. 605; Rev., s. 1198; C.S., s. 1187; G.S., s. 55-126; 1955, c. 1371, s. 1.)

§ 55-124. Venue and service of process.

Every action by the Attorney General for the involuntary dissolution of a corporation shall be commenced in the superior court of the county in which the registered office of the corporation is situated. Summons shall issue and be served as in other civil actions. (1955, c. 1371, s. 1.)

§ 55-125. Power of courts to liquidate and decree involuntary dissolution.

(a) The superior court shall have power to liquidate the assets and business of a corporation in an action by a shareholder when it is established that:

- (1) The directors are deadlocked in the management of the corporate affairs and the shareholders are unable to break the deadlock, so that the business can no longer be conducted to the advantage of all the shareholders; or
- (2) The shareholders are deadlocked in voting power, otherwise than by virtue of special provisions or arrangements designed to create veto power among the shareholders, and for that reason have been unable at two consecutive annual meetings to elect successors to directors whose terms had expired; or
- (3) All of the present shareholders are parties to, or are transferees or subscribers of shares with actual notice of a written agreement, whether embodied in the charter or separate therefrom, entitling the complaining shareholder to liquidation or dissolution of the corporation at will or upon the occurrence of some event which has subsequently occurred; or
- (4) Liquidation is reasonably necessary for the protection of the rights or interests of the complaining shareholder.

(b) The superior court shall have power to liquidate the assets and business of a corporation in an action by a creditor:

- (1) When the claim of the creditor has been reduced to judgment and an execution thereon returned unsatisfied; or
- (2) When the corporation admits in writing that the claim of the creditor is due and it is established that the corporation is unable to pay its debts in the ordinary course of business.

(c) A court that has undertaken the liquidation of the assets and business of a corporation under subsections (a) or (b) of this section may at any time enter a decree dissolving the corporation, and shall upon application of any interested party enter an order declaring liquidation completed.

(d) Actions under this section shall be brought in the county in which the corporation has its registered office or its principal place of business.

(e) Summons shall issue and be served on the corporation as in other civil actions, and it shall not be necessary to make shareholders parties to any such actions unless relief is sought against them personally.

(f) The superior court shall have power to liquidate the assets and business of a corporation when an action has been filed by the Attorney General to dissolve a corporation and it is established that liquidation of its assets and business should precede the entry of a decree of dissolution. (1955, c. 1371, s. 1; 1959, c. 1316, s. 26.)

Legal Periodicals. — For comment discussing alternative remedies to dissolution

for the deadlocked corporation, see 51 N.C.L. Rev. 815 (1973).

CASE NOTES

Editor's Note. — Many of the cases cited below were decided under former statutory provisions.

Section vests broad equitable powers in the trial court in determining whether a corporation should be involuntarily dissolved. *W & H Graphics, Inc. v. Hamby*, 48 N.C. App. 82, 268 S.E.2d 567 (1980).

Power of Court Absent Statute. — As a general rule, the court would have no power, absent statutory direction, to order the dissolution of a corporation simply on the grounds that there was a deadlock or dissention among the directors or stockholders. *Ellis v. Civic Imp., Inc.*, 24 N.C. App. 42, 209 S.E.2d 873 (1974), cert. denied, 286 N.C. 413, 211 S.E.2d 794 (1975).

Finding Required under Subdivision (1) of Subsection (a). — Under subdivision (1) of subsection (a), irreconcilable deadlock of the directorate or shareholders is not sufficient basis for an order of liquidation without a supported finding or conclusion that the shareholders are so deadlocked that its business can no longer be conducted with advantage to all the shareholders. *Ellis v. Civic Imp., Inc.*, 24 N.C. App. 42, 209 S.E.2d 873 (1974), cert. denied, 286 N.C. 413, 211 S.E.2d 794 (1975).

Showing Required under Subdivision (4) of Subsection (a). — When the power of the court in the exercise of its equitable jurisdiction is invoked to liquidate and decree involuntary dissolution under subsection (a)(4), there must be a showing that the liquidation is reasonably necessary for the protection of the rights or interests of the complaining shareholder. *Dowd v. Charlotte Pipe & Foundry Co.*, 263 N.C. 101, 139 S.E.2d 10 (1964).

Sufficient Allegations under Subdivision (4) of Subsection (a). — The superior court has authority, in the exercise of its discretion, under subdivision (4) of subsection (a), to order the liquidation of a corporation upon application of a stockholder alleging that the corpora-

tion had been operating at a loss and that to allow it to continue operations would deplete its assets and seriously damage the stockholders. *Royall v. Carr Lumber Co.*, 248 N.C. 735, 105 S.E.2d 65 (1958).

Corporation Is the Necessary Defendant. — The necessary defendant in an action for involuntary dissolution of a corporation under this section is the corporation itself; shareholders and directors may, but need not be, made parties defendant unless relief is sought against them personally. *W & H Graphics, Inc. v. Hamby*, 48 N.C. App. 82, 268 S.E.2d 567 (1980).

Directors Are Proper Parties to Shareholder's Suit. — Directors are proper parties to a suit to dissolve the corporation upon the complaint of one shareholder, even though no relief is sought against them personally. *Dowd v. Charlotte Pipe & Foundry Co.*, 263 N.C. 101, 139 S.E.2d 10 (1964).

They May Be Joined or Become Parties on Own Application. — The implication in this section is that directors and other interested shareholders may be made, or, on their own application, may become parties to a complaining shareholder's action to liquidate and dissolve the corporation. Certainly, the directors are not improper parties. *Dowd v. Charlotte Pipe & Foundry Co.*, 263 N.C. 101, 139 S.E.2d 10 (1964).

Joinder of Suit for Failure to Declare Dividends with Cause of Action for Liquidation. — A stockholder in a corporation may sue the corporation, and join its directors as defendants, for failure to declare adequate dividends from the corporation's earnings, and may join therewith a second cause of action for liquidation and involuntary dissolution of the corporation based upon bad faith management in suppressing dividends and in deflating the value of the corporation's assets, thus precluding the plaintiff stockholder from obtaining either a fair dividend or a fair market

for his stock. *Dowd v. Charlotte Pipe & Foundry Co.*, 263 N.C. 101, 139 S.E.2d 10 (1964).

As to involuntary liquidation under former statutes, see *Asheville Div. No. 15*, *Sons of Temperance v. Aston*, 92 N.C. 578 (1885); *Simmons v. Norfolk & Baltimore Steamboat Co.*, 113 N.C. 147, 18 S.E. 117 (1893); *Greenleaf v. Land & Lumber Co.*, 146 N.C. 505, 60 S.E. 424 (1908); *Bank of Andrews v. Gudger*, 212 F. 49 (4th Cir. 1914); *Lasley v.*

Walnut Cove Mercantile Co., 179 N.C. 575, 103 S.E. 213 (1920); *Jones v. A. & W.R.R.*, 193 N.C. 590, 137 S.E. 706 (1927).

As to necessity for service on shareholders in suit under former statute for dissolution of corporation, see *Glod v. Castle Hayne Growers & Shippers, Inc.*, 239 N.C. 304, 79 S.E.2d 396 (1954).

Cited in *Osmar v. Crosland-Osmar, Inc.*, 43 N.C. App. 721, 259 S.E.2d 771 (1979).

§ 55-125.1. Discretion of court to grant relief other than dissolution.

(a) In any action filed by a shareholder to dissolve the corporation under G.S. 55-125(a), the court may make such order or grant such relief, other than dissolution, as in its discretion it deems appropriate, including, without limitation, an order:

- (1) Canceling or altering any provision contained in the charter or the bylaws of the corporation; or
- (2) Canceling, altering, or enjoining any resolution or other act of the corporation; or
- (3) Directing or prohibiting any act of the corporation or of shareholders, directors, officers or other persons party to the action; or
- (4) Providing for the purchase at their fair value of shares of any shareholder, either by the corporation or by other shareholders, such fair value to be determined in accordance with such procedures as the court may provide.

(b) Such relief may be granted as an alternative to a decree of dissolution, or may be granted whenever the circumstances of the case are such that relief, but not dissolution, would be appropriate. (1973, c. 469, s. 41.)

Legal Periodicals. — For comment for the deadlocked corporation, see 51 N.C.L. discussing alternative remedies to dissolution Rev. 815 (1973).

§ 55-126. Application for liquidation by court after dissolution.

A corporation, at any time after voluntary dissolution and during the liquidation of its business and affairs, may make application to the superior court of the county in which the registered office or principal place of business of the corporation is situated to have the liquidation conducted or continued under the supervision of the court and, upon the granting of such application, the liquidation shall proceed as provided in this Chapter. Similar application may be made after liquidation has been purportedly completed in either voluntary or involuntary dissolution, when it subsequently appears that newly discovered or inadvertently omitted assets require liquidation, and if no director or appropriate officer makes such application, the application may be made by any creditor or any shareholder or any person having an interest in such liquidation, including the University of North Carolina. (Code, ss. 619, 668, 669; 1901, c. 2, ss. 61, 62; Rev., ss. 1203, 1204; C.S., s. 1195; G.S., s. 55-134; 1955, c. 1371, s. 1.)

§ 55-127. Procedure in liquidation of corporation by court.

In an action to liquidate the assets and business of a corporation, the court shall appoint receivers and the receivers so appointed shall have such powers and duties as are provided in Article 38, Chapter 1 of the General Statutes of North Carolina. (1955, c. 1371, s. 1.)

Legal Periodicals. — For article on North Carolina receivership statutes applicable to insolvent debtors, see 17 Wake Forest L. Rev. 745 (1981).

CASE NOTES

Applied in *Dowd v. Charlotte Pipe & Foundry Co.*, 263 N.C. 101, 139 S.E.2d 10 (1964).

§ 55-128. Discontinuance of liquidation action.

The liquidation of the assets and business of a corporation may be discontinued at any time during the liquidation proceedings when it is established that cause for liquidation no longer exists. In such event the court shall dismiss the action and direct the redelivery to the corporation of all its remaining property and assets and shall decree cancellation of any prior dissolution. (1955, c. 1371, s. 1.)

CASE NOTES

Proceedings on motion by intervening stockholders to vacate an order appointing receivers are without prejudice to the rights of the interveners to petition the court to discontinue liquidation of the corporation under this section. *Royall v. Carr Lumber Co.*, 248 N.C. 735, 105 S.E.2d 65 (1958).

§ 55-129. Duties of officials as to decrees and orders concerning dissolution or charter amendment.

A court decree effecting or canceling a dissolution of a corporation or canceling or altering any provision contained in its charter, or a court order declaring liquidation completed shall contain a direction to the clerk of that court promptly to file one certified copy of such decree or order with the Secretary of State and also to file a certified copy thereof with the register of deeds of the county wherein the corporation has its registered office. The fees for the preparation, certificates, and filing of such decree or order shall be taxed as a part of the costs in the action. The register of deeds shall record and index the order or decree in the Record of Incorporations; promptly after the recordation, the register shall note the fact of recordation on the said copy and return it to the corporation or its representative. If the corporation or its representative cannot be located, the register may destroy the copy. (1955, c. 1371, s. 1; 1967, c. 823, s. 19; 1969, c. 965, s. 1; 1973, c. 469, s. 42.)

§ 55-130. Disposition of amounts due to unavailable shareholders and creditors.

Upon liquidation of a corporation, the portion of the assets distributable to a creditor or shareholder who is unknown or cannot be found shall be disposed of in accordance with Chapter 116B. (1947, c. 613; c. 621, s. 1; G.S., s. 55-132; 1955, c. 1371, s. 1; 1971, c. 1135, s. 4; 1979, 2nd Sess., c. 1311, s. 6.)

Effect of Amendments. — The 1979, 2nd Sess., amendment, effective January 1, 1981, rewrote this section.

Legal Periodicals. — For comment on escheat of intangible property, see 2 Wake Forest Intra. L. Rev. 100 (1966).

§ 55-130.1. Voluntary surrender of corporate rights and franchises by incorporators.

The incorporators named in the articles of incorporation may, before the payment of any part of the capital stock, and before beginning the business for which the corporation was created, surrender the existing corporate rights and franchises, by filing a certificate in the office of the Secretary of State in the manner prescribed by G.S. 55-4, verified by oath, that no part of the capital stock has been paid and received by the corporation and such business has not been begun, and surrendering all rights and franchises. Thereupon the corporation becomes nonexistent and is cancelled as if such corporation had never been created. (1959, c. 1316, s. 26½.)

ARTICLE 10.

Foreign Corporations.

§ 55-131. Right to transact business.

(a) A foreign corporation shall procure a certificate of authority from the Secretary of State before it shall transact business in this State. No foreign corporation shall be entitled to procure a certificate of authority under this Chapter to transact in this State any business which a corporation organized under this Chapter is not permitted to transact. A foreign corporation shall not be denied a certificate of authority by reason of the fact that the laws of the state or country under which such corporation is organized governing its organization and internal affairs differ from the laws of this State.

(b) Without excluding other activities which may not constitute transacting business in this State, a foreign corporation shall not be considered to be transacting business in this State, for the purpose of this Chapter, by reason of carrying on in this State any one or more of the following activities:

- (1) Maintaining or defending any action or suit or any administrative or arbitration proceeding, or effecting the settlement thereof or the settlement of claims or disputes.
- (2) Holding meetings of its directors or shareholders or carrying on other activities concerning its internal affairs.
- (3) Maintaining bank accounts or borrowing money in this State, with or without security, even if such borrowings are repeated and continuous transactions.
- (4) Maintaining offices or agencies for the transfer, exchange, and registration of its securities, or appointing and maintaining trustees or depositaries with relation to its securities.

- (5) Soliciting or procuring orders, whether by mail or through employees or agents or otherwise, where such orders require acceptance without this State before becoming binding contracts.
 - (6) Making or investing in loans with or without security including servicing of mortgages or deeds of trust through independent agencies within the State, the conducting of foreclosure proceedings and sale, the acquiring of property at foreclosure sale and the management and rental of such property for a reasonable time while liquidating its investment, provided no office or agency therefor is maintained in this State.
 - (7) Taking security for or collecting debts due to it or enforcing any rights in property securing the same.
 - (8) Transacting business in interstate commerce.
 - (9) Conducting an isolated transaction completed within a period of six months and not in the course of a number of repeated transactions of like nature.
- (c) No part of this section applies to insurance companies except subsection (b)(6). (1901, c. 2, s. 93; Rev., s. 1193; 1915, c. 196, s. 1; C.S., s. 1180; G.S., s. 55-117; 1955, c. 1371, s. 1.)

Legal Periodicals. — For comment on the duty to register the transfer of investment securities, see 44 N.C.L. Rev. 854 (1966).

For article on "Foreign Corporation Laws: The Loss of Reason," see 47 N.C.L. Rev. 1 (1968).

For article on modern statutory approaches

to service of process outside the State, see 49 N.C.L. Rev. 235 (1971).

For article entitled, "Foreign Corporations in North Carolina: The 'Doing Business' Standards of Qualification, Taxation, and Jurisdiction," see 16 Wake Forest L. Rev. 711 (1980).

CASE NOTES

- I. General Consideration.
- II. Transaction of Business in State.
- III. Interstate Commerce.

I. GENERAL CONSIDERATION.

Editor's Note. — Many of the cases cited below were decided under former statutory provisions.

Matter of Comity Only. — A corporation of one state may do business in another only by comity of the latter state, when not so permitted by a valid federal statute, as in matters of interstate commerce, and may be prohibited from doing business therein entirely, or may be restricted with conditions made a prerequisite by statute. *Lunceford v. Commercial Travelers Mut. Accident Ass'n*, 190 N.C. 314, 129 S.E. 805 (1925). See *Wrought Iron Range Co. v. Carver*, 118 N.C. 328, 24 S.E. 352 (1896); *Blackwell's Durham Tobacco Co. v. American Tobacco Co.*, 145 N.C. 367, 59 S.E. 123 (1907).

Power to Acquire and Sell Land. — Foreign corporations, having a right under their charters to acquire and sell land, can exercise such rights in this State to the same extent that corporations of this State can do so. *Barcello v. Hapgood*, 118 N.C. 712, 24 S.E. 124 (1896).

Substituted Service Proper against Domesticated Foreign Corporation Wherever Cause of Action Arose. — A foreign corporation which has complied with this Article and has been duly authorized to do business in this State, may be sued in this State by substituted service on the Secretary of State on a cause of action arising either inside or outside the State. *Atlantic Coast Line R.R. v. J.B. Hunt & Sons*, 260 N.C. 717, 133 S.E.2d 644 (1963).

Stated in Westarc Leasing Corp. v. Capital Sign Serv., Inc., 268 N.C. 601, 151 S.E.2d 204 (1966).

Cited in Crabtree v. Coats & Burchard Co., 7 N.C. App. 624, 173 S.E.2d 473 (1970).

II. TRANSACTION OF BUSINESS IN STATE.

"Shall transact business in this State" construed. — Requires the engaging in, carrying on or exercising, in North Carolina, some of the functions for which the corporation was created. *Canterbury v. Monroe Lange Hardwood Imports*, 48 N.C. App. 90, 268 S.E.2d 868 (1980).

The business done by the corporation in this State, to satisfy the requirements of this section, must be of such nature and character as to warrant the inference that the corporation has subjected itself to the local jurisdiction and is, by its duly authorized officers and agents, present within the State. *Canterbury v. Monroe Lange Hardwood Imports*, 48 N.C. App. 90, 268 S.E.2d 868 (1980).

Cases Decided under § 55-144 Relevant. — The definition of "transacting business" set forth in this section is applicable to § 55-144, and any cases determined under the latter statute are relevant in considering the applicability of this section. *Snelling & Snelling, Inc. v. Watson*, 41 N.C. App. 193, 254 S.E.2d 785 (1979).

Activities Must Be Substantial and Regular. — The activities carried on by the corporation in North Carolina must be substantial, continuous, systematic and regular to constitute "transacting business in this State" for purposes of this section. *Canterbury v. Monroe Lange Hardwood Imports*, 48 N.C. App. 90, 268 S.E.2d 868 (1980).

Mere soliciting or procuring orders through employees or agents, where such orders require acceptance without this State before becoming binding contracts, does not constitute "transacting business" in this State. *Schnur & Cohan, Inc. v. McDonald*, 220 F. Supp. 9 (M.D.N.C. 1963), appeal dismissed, 328 F.2d 103 (4th Cir. 1964).

Facts held to constitute more than "soliciting or procuring orders" requiring acceptance without the State. See *Dumas v. Chesapeake & O. Ry.*, 253 N.C. 501, 117 S.E.2d 426 (1960).

III. INTERSTATE COMMERCE.

Test of Interstate Commerce. —

Importation into one State from another is the indispensable element, the test, of interstate commerce; and every negotiation, contract, trade and dealing between citizens of different states, which contemplates and causes such importation, whether it be of goods, persons or information, is a transaction of interstate commerce. *Snelling & Snelling, Inc. v. Watson*, 41 N.C. App. 193, 254 S.E.2d 785 (1979).

Not all interstate commerce is sales of goods. *Snelling & Snelling, Inc. v. Watson*, 41 N.C. App. 193, 254 S.E.2d 785 (1979).

Sale of services can constitute interstate commerce. *Snelling & Snelling, Inc. v. Watson*, 41 N.C. App. 193, 254 S.E.2d 785 (1979).

Franchisor of Employment Agencies Engaged in Interstate Commerce. — Where plaintiff foreign corporation, a franchisor of employment agencies, maintained no offices in this State, and had no officers or employees residing in this State, and where its activities in this State consisted of: (1) soliciting franchise agreements and promoting sales of its business forms, (2) training and instructing its franchisees and inspecting the premises, books and records of its franchisees, and (3) controlling the business methods of its franchisees to protect its service mark and to ensure an accurate accounting of profits by its franchisees, plaintiff was transacting business in interstate commerce within the meaning of subdivision (b)(8) and was not required to obtain a certificate of authority from the Secretary of State as a prerequisite to bringing suit in this State, since plaintiff's activities were incidental to its interstate franchise contracts and were, therefore, interstate in nature. *Snelling & Snelling, Inc. v. Watson*, 41 N.C. App. 193, 254 S.E.2d 785 (1979).

§ 55-132. Powers of foreign corporation.

(a) A foreign corporation which shall have received a certificate of authority under this Chapter shall, until a certificate of revocation or of withdrawal shall have been issued as provided in this Chapter, enjoy the same, but not greater, rights and privileges as a domestic corporation organized for the purposes set forth in the application pursuant to which such certificate of authority is issued.

(b) A foreign corporation, however, is not eligible or entitled to qualify in this State as executor, administrator, or guardian, or as trustee under the will of any person domiciled in this State at the time of his death, except that a foreign corporation chartered under the banking laws of Georgia, South Carolina, Tennessee or Virginia or as a national banking association in any said states may act as testamentary trustee, or executor in this State if:

- (1) It has a bona fide capital of at least two hundred and fifty thousand dollars (\$250,000) actually paid in;
- (2) It is authorized to act in such fiduciary capacity in the state in which it is incorporated or if such foreign corporation be a national banking

association in the state in which it has its principal place of business; and

- (3) Any bank or other corporation organized under the laws of this State or a national banking association having its principal place of business in this State is permitted by law to act in such fiduciary capacity in the state in which such foreign corporation seeking to act in this State is organized or in which it has its principal place of business if it is a national banking association without further showing or qualification other than that it is authorized to act in such fiduciary capacity in this State and upon compliance with the laws of such other state, if any, concerning service of process on nonresident fiduciaries.

Unless assets of the estate are to be removed from within the State of North Carolina, such foreign corporations seeking to act as testamentary trustee, or executor in this State, upon qualifying to act in such fiduciary capacity, shall not be required by law to give bond except as required of a resident corporate fiduciary in like circumstances. No officer, employee or agent of any such foreign corporation shall be eligible or entitled to serve as testamentary trustee, or executor in this State whether such officer, employee, or agent is a resident or a nonresident of this State if such officer, employee, or agent is acting as testamentary trustee, or executor on behalf of any such foreign corporation except when such foreign corporation itself shall be eligible to so serve.

A foreign corporation qualifying as testamentary trustee or executor under the provisions of this section shall appoint a process agent in the same manner as now provided under G.S. 28-186 in the case of nonresident executors. (1901, c. 2, s. 93; Rev., s. 1193; 1915, c. 196, s. 1; C.S., s. 1180; G.S., s. 55-117; 1955, c. 1371, s. 1; 1969, c. 839.)

Editor's Note. — Section 28-186, referred to in the last paragraph of subsection (b), was repealed by Session Laws 1973, c. 1329, s. 1.

CASE NOTES

Editor's Note. — Many of the cases cited below were decided under former statutory provisions.

Right to Sue and Be Sued. — Where a foreign corporation has submitted to domestication in this State by filing its certificate of incorporation with the Secretary of State and by otherwise complying with the provisions of the statute, it thereby acquires the right to sue and be sued in the courts of this State as a domestic corporation. *Smith-Douglass Co. v. Honeycutt*, 204 N.C. 219, 167 S.E. 810 (1933).

When a foreign corporation complies with the provisions of the statute as to "domestication," it subjects itself to the laws of this State and acquires in return certain compensating rights and privileges. Among these is the right to sue and be sued in the State courts under the rules and regulations which apply to domestic corporations. *Hill v. Atlantic Greyhound Corp.*, 229 N.C. 728, 51 S.E.2d 183 (1949).

Section 1-80 Does Not Apply. — A foreign corporation domesticated under the statute may sue and be sued under the rules and regu-

lations which apply to domestic corporations, and is entitled to have an action against it, instituted by a nonresident, removed to the county of its main place of business in this State. In such case § 1-80 does not apply. *Hill v. Atlantic Greyhound Corp.*, 229 N.C. 728, 51 S.E.2d 183 (1949).

Power to Maintain Action Notwithstanding Charter. — A corporation incorporated in another state with authority to conduct business in North Carolina, which has complied with the statutes of this State, can maintain an action in the courts of this State although its charter may not authorize it to do business in the state of its incorporation. *Troy & N.C. Gold Mining Co. v. Snow Lumber Co.*, 173 N.C. 593, 92 S.E. 494 (1917).

Right to Remove to Federal Courts. — A foreign corporation by compliance with the statute as to "domestication" does not lose its right to remove to the federal courts on the ground of diverse citizenship. *Southern Ry. v. Allison*, 190 U.S. 326, 23 S. Ct. 713, 47 L. Ed. 1078 (1903).

For purposes of venue domesticated foreign corporations are residents of the State. *Hill v. Atlantic Greyhound Corp.*, 229 N.C. 728, 51 S.E.2d 183 (1949).

Neither Property Nor Situs of Debts Removed to State. — The statute requiring "domestication" enables a plaintiff to get personal service upon a foreign corporation, but does not remove its property to the State nor the situs of its debts created elsewhere. *Strause Bros. v. Aetna Fire Ins. Co.*, 126 N.C. 223, 35 S.E. 471 (1900).

How Charter Proven. — The charter of a foreign corporation may be proven in this State by exhibiting a copy duly certified by the Secretary of State of the state in which the corpora-

tion was created. *Barcello v. Hapgood*, 118 N.C. 712, 24 S.E. 124 (1896).

Regulation of Securities Issued by Foreign Corporation. — The mere fact that a public utility otherwise subject to the jurisdiction of this State is a foreign corporation does not deprive this State of all supervisory and regulatory powers over securities issued by such a corporation. *State ex rel. Utilities Comm'n v. Southern Bell Tel. & Tel. Co.*, 22 N.C. App. 714, 207 S.E.2d 771 (1974), *aff'd*, 288 N.C. 201, 217 S.E.2d 543 (1975).

Effect of Domestication of Insurance Company. — See *Occidental Life Ins. Co. v. Lawrence*, 204 N.C. 707, 169 S.E. 636 (1933).

§ 55-133. Dismissal of actions against foreign corporations.

(a) No action in the courts of this State shall be dismissed solely on the ground that it involves the internal affairs of a foreign corporation but the court may in its discretion dismiss such an action if it appears that more adequate relief can be granted or that the convenience of the parties would be better served by an action brought in the jurisdiction of its incorporation or in the jurisdiction where the corporation has its executive or managerial headquarters or, because of the circumstances, in some other jurisdiction.

(b) Any action upon a cause of action not arising out of business transacted or activities performed in this State brought against a foreign corporation by a nonresident of this State may in the discretion of the court be dismissed if it appears that the convenience of the parties would be better served by an action brought in some other jurisdiction. (1955, c. 1371, s. 1.)

CASE NOTES

Action to Compel Declaration of Dividend by Foreign Corporation. — Whether the courts of North Carolina will entertain an action to compel the declaration of a dividend by a foreign corporation rests on expediency and convenience under subsection (a) of this section, and where in such action it appears that the foreign corporation is doing business in North Carolina, that the question of declaring

dividends had heretofore been determined by its directors in regular meetings in this State, and that the court has power to enforce any decree it may render by order directed to a majority of the directors of the corporation who reside in the State, a motion to dismiss the action for want of jurisdiction was properly denied. *Belk v. Belk's Dep't Store of Columbia, S.C., Inc.*, 250 N.C. 99, 108 S.E.2d 131 (1959).

§§ 55-134 to 55-136: Omitted.

§ 55-137. Corporate name of foreign corporation.

(a) No certificate of authority shall be issued to a foreign corporation unless the corporate name of such corporation shall contain the wording "corporation," "incorporated," "limited," or "company," or shall contain an abbreviation of one of such words, or such corporation shall, for use in this State, add at the end of its name one of such words or an abbreviation thereof.

(b) The corporate name shall not contain any word or phrase which is likely to mislead the public or which indicates or implies that it is organized for any purpose other than one or more of the purposes contained in its charter.

(c) The corporate name shall not be the same as, or deceptively similar to, the name of any domestic corporation, whether for profit or not for profit, or any foreign corporation, whether for profit or not for profit, authorized to transact business in this State, or a name the exclusive right to which is, at the time, reserved or registered in the manner prescribed in G.S. 55-12, except that the Secretary of State may in his discretion issue a certificate of authority to a foreign corporation which has a corporate name the same as or similar to that of some other domestic corporation or foreign corporation authorized to transact business in this State:

- (1) If the Secretary of State finds, upon proof by affidavit or otherwise, that such corporations are not engaged in the same or similar businesses and that the public is not likely to be confused or deceived, and if, upon requirement by the Secretary of State in his discretion, such foreign corporation agrees in its application for certificate of authority to add to its corporate name in this State words indicating the state or country under the laws of which it is incorporated; or
- (2) If the foreign corporation agrees in its application for certificate of authority to do business in this State only under an assumed name that would be available for use in this State, in which event such corporation shall thereafter comply with all of the provisions of law, including the provisions of G.S. 66-68 through 66-71, relating to doing business under an assumed name and such assumed name shall be deemed to be the name of such foreign corporation in this State and shall be entitled to the same protection under this Chapter as if it were the name of such foreign corporation.

(d) Whenever a foreign corporation which is authorized to transact business in this State shall change its name to one under which a certificate of authority would not be granted to it on application therefor, the certificate of authority of such corporation shall not be deemed to permit the use in its business in this State of the new name nor shall any new certificate of authority be granted to it under the new name.

(e) The issuance of a certificate of authority to any foreign corporation shall not authorize the use in this State of the corporate name in violation of the rights of any third party under the federal Trademark Act, the Trademark Act of this State, or of the common law; and the issuance of such certificate shall not be a defense to an action for violation of any such rights. (1901, c. 2, s. 8; 1903, c. 453; Rev., s. 1137; 1913, c. 5, s. 1; C.S., s. 1114; 1935, cc. 166, 320; 1939, c. 222; G.S., s. 55-2; 1955, c. 1371, s. 1; 1959, c. 1316, s. 27; 1969, c. 751, s. 40; 1971, c. 1093, s. 1; 1973, c. 469, s. 45.4.)

§ 55-138. Application for certificate of authority.

(a) A foreign corporation, in order to procure a certificate of authority to transact business in this State, shall make application therefor to the Secretary of State, which application shall set forth:

- (1) The name of the corporation and the state or country under the laws of which it is incorporated.
- (2) If the name of the corporation does not contain the word "corporation," "incorporated," "limited," or "company," or does not contain an abbreviation of one of such words, then the name of the corporation with the word or abbreviation which it elects to add thereto for use in this State; or if the corporation agrees under G.S. 55-137(c) to add to its corporate name in this State words indicating its jurisdiction of incorporation or agrees to do business under an assumed name, then the name of the corporation with the words so added or the assumed name which name must contain the words or abbreviations required by this subdivision.

- (3) The date of incorporation and the period of duration of the corporation.
- (4) The address of the principal office of the corporation in the state or country under the laws of which it is incorporated.
- (5) The address, including county and city or town, and street and number, if any, of the proposed registered office of the corporation in this State, and the name of its proposed registered agent in this State at such address.
- (6) The purpose or purposes of the corporation which it proposes to pursue in the transaction of business in this State.
- (7) The names and respective addresses of the directors and officers of the corporation.
- (8) A statement of the aggregate number of shares which the corporation has authority to issue, itemized by classes, par value of shares, shares without par value, and series, if any, within a class.
- (9) A statement of the aggregate number of issued shares itemized by classes, par value of shares, shares without par value, and series, if any, within a class.
- (10) A statement that, in consideration of the issuance of a certificate of authority to transact business in this State, the corporation appoints the Secretary of State of North Carolina as its agent to receive service of process, notice, or demand whenever the corporation fails to appoint or maintain a registered agent in this State, or whenever any such registered agent cannot with reasonable diligence be found at the registered office.

(b) Such application shall be executed by the corporation by its president or a vice-president and by its secretary or an assistant secretary, and verified by one of its officers signing such application. (1955, c. 1371, s. 1; 1957, c. 979, s. 8; 1969, c. 751, s. 41.)

Cross References. — As to required filing of corporate charter, see § 55-139. As to limitations on authority of Secretary of State to act as process agent, see § 55-143.

CASE NOTES

Instrument Merely Notice of Facts Contained in It. — The instrument a foreign domesticated corporation is required to file in the office of the Secretary of State under this section is merely notice of facts set forth in it. It is not required for the benefit of the corporation but for the information of the public. And it does not, in and of itself, fix the location of the place of business of the corporation which files the same. *Noland Co. v. Laxton Constr. Co.*, 244 N.C. 50, 92 S.E.2d 398 (1956), decided under former § 55-118.

Section Inapplicable Where Foreign Corporation Has Complied with Requirements for Domestication. — Where a foreign corporation has complied with the statutory requirements for domestication it is not required to file with the Secretary of State the certificate prescribed by this section, nor is it required to notify the Secretary of State of its principal office in this State. *Aetna Cas. & Sur. Co. v.*

Petroleum Transit Co., 266 N.C. 756, 147 S.E.2d 229 (1966).

Venue of Action against Domesticated Foreign Corporation. — Where it was found that defendant was a domesticated foreign corporation doing extensive business in the middle district of North Carolina and maintained warehouses in Salisbury, High Point, Asheboro, Greensboro and Durham from which it distributed in the middle district its products, under both the State law and federal rules of procedure the venue was properly placed in the middle district of North Carolina. *Graham v. Taylor Biscuit Co.*, 157 F. Supp. 496 (M.D.N.C. 1957), decided under former § 55-118.

A foreign corporation which duly domesticates in this State pursuant to subdivision (5) of subsection (a) is to be treated like a domestic corporation for venue purposes. *Moore Golf, Inc. v. Shambley Wrecking Contractors, Inc.*, 22 N.C. App. 449, 206 S.E.2d 789 (1974).

§ 55-139. Filing of application for certificate of authority.

(a) The application of the corporation for a certificate of authority and one conformed copy thereof shall be delivered to the Secretary of State, together with one copy of its articles of incorporation and all amendments thereto, or where that is permitted by the laws of the place of its incorporation, one copy of its restated or integrated or consolidated charter, duly authenticated by the proper officer of the state or country under the laws of which it is incorporated.

(b) If the Secretary of State finds that the application conforms to law he shall, when all taxes and fees have been tendered as in this Chapter prescribed:

- (1) Endorse on each of such documents the word "filed" and the hour, day, month, and year of the filing thereof.
- (2) File in his office the application and the copy of the articles of incorporation and amendments thereto or of one of the substitute documents mentioned in subsection (a) of this section.
- (3) Issue a certificate of authority to transact business in this State to which he shall affix the conformed copy of the application.
- (4) Send to the corporation or its representative the certificate of authority, together with the conformed copy of the application affixed thereto. (1901, c. 2, s. 57; 1903, c. 76; Rev., s. 1194; 1915, c. 263; C.S., s. 1181; 1935, c. 44; 1939, c. 57; G.S., s. 55-118; 1953, c. 1152; 1955, c. 1371, s. 1.)

§ 55-140. Effect of certificate of authority.

Upon the issuance of a certificate of authority by the Secretary of State, the corporation shall be authorized to transact business in this State for those purposes set forth in its application, subject, however, to the right of this State to suspend or to revoke such authority as provided in this Chapter. (1955, c. 1371, s. 1.)

§ 55-141. Registered office and registered agent of foreign corporation.

Each foreign corporation authorized to transact business in this State shall establish and continuously maintain in this State:

- (1) A registered office which may be, but need not be, the same as its place of business in this State.
- (2) A registered agent, which agent may be either an individual resident in this State whose business office is identical with such registered office, or a domestic corporation or a foreign corporation authorized to transact business in this State, having a business office identical with such registered office. (1901, c. 5; Rev., s. 1243; C.S., s. 1137; G.S., s. 55-38; 1955, c. 1371, s. 1.)

§ 55-142. Change of registered office or registered agent of foreign corporation.

(a) A foreign corporation authorized to transact business in this State may change its registered office or change its registered agent, or both, upon filing in the office of the Secretary of State a statement setting forth:

- (1) The name of the corporation.
- (2) The address, including county and city or town, and street and number, if any, of its then registered office.
- (3) If the address of its registered office be changed, the address, including county and city or town, and street and number, if any, to which the registered office is to be changed.

- (4) The name of its then registered agent.
 - (5) If its registered agent be changed, the name of its successor registered agent.
 - (6) That the address of its registered office and the address of the business office of its registered agent, as changed, will be identical.
- (b) Such statement shall be executed by the corporation by its president or a vice-president and by its secretary or an assistant secretary, and verified by one of its officers signing the statement.
- (c) If the Secretary of State finds that such statement conforms to the provisions of this Chapter, he shall file such statement in his office, and upon such filing the change of address of the registered office, or the appointment of a new registered agent, or both, as the case may be, shall become effective.
- (d) In lieu of the procedure set out in subsection (a) above, the location of the registered office of a foreign corporation may be changed from one address to another in the same city or town in this State upon the change of the business office of its registered agent, upon the making and executing by the registered agent of such corporation of a certificate, duly acknowledged before an officer authorized by the laws of this State to take acknowledgments of deeds, setting forth the name of each corporation represented by such registered agent and the address at which such registered agent has maintained a registered office for each of such corporations and further certifying to the new address to which such registered office will be transferred on a given day and at which new address such registered agent will thereafter maintain the registered office of each of the corporations recited in the certificate. The fee to be charged by the Secretary of State for the filing of such certificate shall be a fee of three dollars (\$3.00) for each corporation listed in said certificate. (1955, c. 1371, s. 1; 1957, c. 979, ss. 9, 10; 1965, c. 298, s. 2.)

Legal Periodicals. — For note on the 1965 amendments to this Chapter, see 44 N.C.L. Rev. 1106 (1966).

CASE NOTES

Taking Advantage of Failure to File Notice of Change of Residence. — A foreign corporation which neglected for a period of 18 days to file notice of change of its residence could not take advantage of its own delay by

filing a suit in the county of its old residence. *Noland Co. v. Laxton Constr. Co.*, 244 N.C. 50, 92 S.E.2d 398 (1956), decided under a former statute.

§ 55-143. Suits against foreign corporations authorized to transact business in this State.

(a) The registered agent appointed by a foreign corporation authorized to transact business in this State shall be an agent of such corporation upon whom any process, notice, or demand required or permitted by law to be served upon the corporation may be served.

(b) Whenever a foreign corporation authorized to transact business in this State shall fail to appoint or maintain a registered agent in this State, or whenever any such registered agent cannot with reasonable diligence be found at the registered office, then the Secretary of State shall be an agent of such corporation upon whom any process, notice, or demand may be served.

(c) Service on any such agent may be made in a suit upon any cause of action, whether or not arising in this State or arising out of business transacted in this State, and whether or not the cause of action runs in favor of a resident of this State. (1901, c. 5; Rev., s. 1243; C.S., s. 1137; G.S., s. 55-38; 1955, c. 1371, s. 1.)

Cross References. — As to what constitutes doing business in State, see § 55-131.

Legal Periodicals. — For article on modern statutory approaches to service of process outside the State, see 49 N.C.L. Rev. 235 (1971).

For article entitled, "Foreign Corporations in North Carolina: The 'Doing Business' Standards of Qualification, Taxation, and Jurisdiction," see 16 Wake Forest L. Rev. 711 (1980).

CASE NOTES

I. General Consideration.

II. Service on Secretary of State.

I. GENERAL CONSIDERATION.

Editor's Note. — Many of the cases cited below were decided under former statutory provisions.

Constitutionality. — This section and § 55-144, are constitutional. *Fisher v. Ins. Co.*, 136 N.C. 217, 48 S.E. 667 (1904); *Currie v. Golconda Mining & Milling Co.*, 157 N.C. 209, 72 S.E. 980 (1911); *Harrington v. Croft Steel Prods., Inc.*, 244 N.C. 675, 94 S.E.2d 803 (1956).

Purpose of this section is, in recognition of reciprocal duties, to prevent a foreign corporation from accepting protection of this State's laws in the transaction of its ordinary business, create obligations and, by reason of its remoteness from any forum available to a local citizen, secure immunity from liability. *State Hwy. & Pub. Works Comm'n v. Diamond S.S. Transp. Corp.*, 225 N.C. 198, 34 S.E.2d 78 (1945).

Liberal Construction. — Within reasonable limits this section and § 55-144 shall be liberally construed to accomplish their remedial purpose. *State Hwy. & Pub. Works Comm'n v. Diamond S.S. Transp. Corp.*, 225 N.C. 198, 34 S.E.2d 78 (1945).

Domesticated Foreign Corporation May Be Sued Like Domestic Corporation. — The policy of this section is to treat the foreign corporation which is authorized to transact business in this State just as a domestic corporation is treated, insofar as suability is concerned. *Atlantic Coast Line R.R. v. J.B. Hunt & Sons*, 260 N.C. 717, 133 S.E.2d 644 (1963).

Section inapplicable to Undomesticated Foreign Corporations. — This section applies to service of process on a foreign corporation only in those instances in which the corporation has domesticated here, regardless of whether or not the cause of action arose in this State and regardless of whether the action relates to business transacted in this State, and this section has no application to a foreign corporation which has not domesticated here. *Atlantic Coast Line R.R. v. J.B. Hunt & Sons*, 260 N.C. 717, 133 S.E.2d 644 (1963).

Service on Process Agent of Subsidiary Owned by Foreign Corporation. — A foreign corporation, which contracted with and sold farm equipment to dealers in North Carolina for resale through a wholly owned subsidiary,

was not doing business in the State and was not subject to suit in North Carolina by virtue of process served on the process agent of the subsidiary corporation. *Harris v. Deere & Co.*, 128 F. Supp. 799 (E.D.N.C.), *aff'd*, 223 F.2d 161 (4th Cir. 1955).

Service of process on an insurance company is not restricted to the method prescribed by § 58-153 but might be made also in the manner prescribed by this section. *Fisher v. Ins. Co.*, 136 N.C. 217, 48 S.E. 667 (1904); *Pardue v. Absher*, 174 N.C. 676, 94 S.E. 414 (1917).

Federal land bank created by act of Congress and deriving its right to own property and to do business in this State solely through a federal statute is not a foreign corporation exercising such function under express or implied authority of this State, and this section is not applicable to such a corporation, and this State's courts acquire no jurisdiction over it by service as provided in that section. *Leggett v. Federal Land Bank*, 204 N.C. 151, 167 S.E. 557 (1933).

Foreign Corporation May Plead Statute of Limitations. — A foreign corporation which has complied with the requirements of the statute in maintaining an agent in this State upon whom process may be served, as well as a public service corporation doing business in this State, may plead the statute of limitations. *Volivar v. Richmond Cedar Works*, 152 N.C. 656, 68 S.E. 200 (1910), overruling *Green v. Insurance Co.*, 139 N.C. 309, 51 S.E. 887 (1905). See also *State ex rel. Anderson-Oliver v. United States Fid. Co.*, 174 N.C. 417, 93 S.E. 948 (1917).

The nonresidence of a foreign corporation will not prevent the running of the statute of limitations in its favor, where constantly from the accrual of the cause of action it might have been served with summons under the provisions of a statute. *Smith v. Finance Co. of Am.*, 207 N.C. 367, 177 S.E. 183 (1934).

Without Formal Compliance with Domesticating Requirements. — Formal compliance with the statutory requirements for domesticating foreign corporations and the appointment of process agents is not required in order to entitle such corporations to the benefit of the statute of limitations; it is sufficient if such corporations doing business within the State have

been continuously for the statutory period subject to valid service of process, so as to confer jurisdiction on our courts to render binding judgments in personam against them. State ex rel. Anderson-Oliver v. United States Fid. Co., 174 N.C. 417, 93 S.E. 948 (1917).

Applied in Royal Bus. Funds Corp. v. South E. Dev. Corp., 32 N.C. App. 362, 232 S.E.2d 215 (1977).

Cited in Abney Mills v. Tri-State Motor Transit Co., 268 N.C. 313, 150 S.E.2d 585 (1966); Shew v. Royce Chem. Co., 5 N.C. App. 444, 168 S.E.2d 701 (1969); Canterbury v. Monroe Lange Hardwood Imports, 48 N.C. App. 90, 268 S.E.2d 868 (1980).

II. SERVICE ON SECRETARY OF STATE.

Subsection (c) of this section changed the former rule laid down in Central Motor Lines v. Brooks Transp. Co., 225 N.C. 733, 36 S.E.2d 271, 162 A.L.R. 1419 (1945) and earlier cases, that substituted service on the Secretary of State was not valid where the cause of action arose outside the State and was not connected with the corporation's activities in this State. Atlantic Coast Line R.R. v. J.B. Hunt & Sons, 260 N.C. 717, 133 S.E.2d 644 (1963).

When Secretary of State Becomes Process Agent. — If a foreign corporation fails to appoint or maintain a registered agent in this State, or whenever such agent cannot be found, then the Secretary of State becomes an agent upon whom process may be served. Atlantic Coast Line R.R. v. J.B. Hunt & Sons, 260 N.C. 717, 133 S.E.2d 644 (1963).

Express consent to substituted service is required at the time the foreign corporation domesticates, and such express consent cures the constitutional difficulty presented by transitory causes of action. Atlantic Coast Line R.R. v. J.B. Hunt & Sons, 260 N.C. 717, 133 S.E.2d 644 (1963).

Thus, Domesticated Foreign Corporation May Be Sued by Substituted Service on Transitory Cause of Action. — A foreign corporation which has complied with this Article and has been duly authorized to do business in this State, may be sued in this State by substituted service on the Secretary of State on a cause of action arising either inside or outside the State. Atlantic Coast Line R.R. v. J.B. Hunt & Sons, 260 N.C. 717, 133 S.E.2d 644 (1963).

Whether or Not Suit Relates to Business Transacted in State. — This section sanctions a suit in this State against a foreign corporation authorized to transact business in this State by service on the registered agent, or on the Secretary of State if there is no such agent, whether or not it relates to business transacted in this State. Atlantic Coast Line R.R. v. J.B. Hunt & Sons, 260 N.C. 717, 133 S.E.2d 644 (1963).

Substituted Service in Action against Such Corporation for Tort Committed outside State Is Unauthorized. — No statute in North Carolina authorizes service upon the Secretary of State in an action against an undomesticated foreign corporation doing business in this State or a tort committed outside this State. Atlantic Coast Line R.R. v. J.B. Hunt & Sons, 260 N.C. 717, 133 S.E.2d 644 (1963).

§ 55-144. Suits against foreign corporations transacting business in the State without authorization.

Whenever a foreign corporation shall transact business in this State without first procuring a certificate of authority so to do from the Secretary of State or after its certificate of authority shall have been withdrawn, suspended, or revoked, then the Secretary of State shall be an agent of such corporation upon whom any process, notice, or demand in any suit upon a cause of action arising out of such business may be served. (1901, c. 5; Rev., s. 1243; C.S., s. 1137; G.S., s. 55-38; 1955, c. 1143; c. 1371, s. 1.)

Cross References. — As to what does not constitute transacting business within State, see § 55-131.

Legal Periodicals. — For note on jurisdiction over foreign corporations, see 35 N.C.L. Rev. 546 (1957).

For case law survey on conflict of laws, see 43 N.C.L. Rev. 895 (1965).

For case law survey on trial practice, see 43 N.C.L. Rev. 938 (1965).

For note on jurisdiction over foreign corporations not qualified to transact business in North Carolina, see 44 N.C.L. Rev. 449 (1966).

For article on modern statutory approaches to service of process outside the State, see 49 N.C.L. Rev. 235 (1971).

For article entitled, "Foreign Corporations in North Carolina: The 'Doing Business' Standards of Qualification, Taxation, and Jurisdiction," see 16 Wake Forest L. Rev. 711 (1980).

CASE NOTES

- I. General Consideration.
- II. Transacting or Doing Business within State.
 - A. In General.
 - B. Activity Constituting Business within State.
 - C. Activity Not Constituting Business within State.

I. GENERAL CONSIDERATION.

Editor's Note. — Many of the cases cited below were decided under former statutory provisions.

Constitutionality. — This section and § 55-143 are constitutional. *Harrington v. Croft Steel Prods., Inc.*, 244 N.C. 675, 94 S.E.2d 803 (1956).

This section and § 55-146 apply exclusively to foreign corporations. Whether analogous statutes applicable to nonresident unincorporated associations should be enacted is for legislative determination. *Melton v. Hill*, 251 N.C. 134, 110 S.E.2d 875 (1959).

Section requires more "contacts" in this State than § 55-145, which provides for service on foreign corporations even though not transacting business in this State. *Worley's Beverages, Inc. v. Bubble Up Corp.*, 167 F. Supp. 498 (E.D.N.C. 1958).

This section concerns "foreign corporations transacting business in the State" and, therefore, necessarily seems to be more restrictive in its application than § 55-145, the latter section dealing with "foreign corporations not transacting business" in the State. The foreign corporation must have more contacts with the forum state in order to come within the statutory limits of this section. *Bowman v. Curt G. Joa, Inc.*, 361 F.2d 706 (4th Cir. 1966); *Long v. Burdette Mfg. Co.*, 294 F. Supp. 784 (W.D.N.C. 1968), rev'd on other grounds, 460 F.2d 448 (4th Cir. 1972); *Epps v. Golden*, 295 F. Supp. 520 (W.D.N.C. 1968).

More contacts with the forum State are required in order to come within the limits of this section than are required under § 55-145. *Epps v. Golden*, 295 F. Supp. 520 (W.D.N.C. 1968).

Section Preserves Rule as to Substituted Service. — The rule as to substituted service on foreign corporations which transact business in this State without domesticating is preserved by this section. *Atlantic Coast Line R.R. v. J.B. Hunt & Sons*, 260 N.C. 717, 133 S.E.2d 644 (1963).

Doing Business in State Is Acceptance of Statute. — Where foreign corporations come into the State to do business after the enactment of a statute providing a method of personal service on them, reasonably calculated to give them full notice of the pendency of suits against them, the statutory provisions are

regarded as conditions on which they are allowed to do business within the State, and their doing business here thereafter is an acceptance by them of the statutory method and a recognition of its validity to confer jurisdiction on courts of this State by service thereunder. *State ex rel. Anderson-Oliver v. United States Fid. Co.*, 174 N.C. 417, 93 S.E. 948 (1917).

Conditions Precedent to Valid Service. — There are three conditions precedent to valid service under this section, namely: (1) The foreign corporation must transact business in this State; (2) the foreign corporation must transact business in this State without first procuring a certificate of authority from the Secretary of State; and (3) there must be a cause of action arising out of such business. *Epps v. Golden*, 295 F. Supp. 520 (W.D.N.C. 1968).

If the defendant does not contend that it has a process agent in North Carolina, service on the Secretary of State is sufficient to bring the defendant into court. *Crabtree v. Coats & Burchard Co.*, 7 N.C. App. 624, 173 S.E.2d 473 (1970).

Cause of Action Must Arise in This State for Substituted Service. — An action based upon substituted service on the Secretary of State may be maintained against an undomesticated foreign corporation only on causes arising within the State. *Atlantic Coast Line R.R. v. J.B. Hunt & Sons*, 260 N.C. 717, 133 S.E.2d 644 (1963).

But Service Is Not Authorized in Every Such Case. — This section does not authorize service of summons upon the Secretary of State in all cases where the cause of action arose in this State. *Abney Mills v. Tri-State Motor Transit Co.*, 268 N.C. 313, 150 S.E.2d 585 (1966).

And Such Service Is Limited to Causes of Action from Business Transacted in State. — This section expressly limits substituted service upon the Secretary of State where the foreign corporation has not domesticated, to suits upon a cause of action arising out of business transacted in this State. *Atlantic Coast Line R.R. v. J.B. Hunt & Sons*, 260 N.C. 717, 133 S.E.2d 644 (1963).

This section applies only when the cause of action against a foreign corporation arises out of business conducted by it in this State, and therefore, when a transitory cause of action arises in another state, this section can have no application. *Atlantic Coast Line R.R. v. J.B. Hunt & Sons*, 260 N.C. 717, 133 S.E.2d 644 (1963).

For the service of process upon the Secretary of State to be valid and binding upon defendant, two things must exist, by reason of the express provisions of this section: (1) Defendant must have transacted business in this State, and (2) the cause of action here must have arisen out of such business. *Abney Mills v. Tri-State Motor Transit Co.*, 265 N.C. 61, 143 S.E.2d 235 (1965).

Cause of Action Arising Out of Business Conducted in State Is Not Transitory. — Where the defendant was conducting business in this State with the plaintiff and other residents of this State and maintained an office in this State for that purpose and where a substantial portion of plaintiff's cause of action arose out of such business, the cause of action is not a transitory one arising in another state but is local in nature. *Crabtree v. Coats & Burchard Co.*, 7 N.C. App. 624, 173 S.E.2d 473 (1970).

Undomesticated Corporation May Not Be Sued on Transitory Foreign Cause of Action. — A foreign corporation which has done business in the State without complying with the law may not be brought into court on a transitory foreign cause of action. *Atlantic Coast Line R.R. v. J.B. Hunt & Sons*, 260 N.C. 717, 133 S.E.2d 644 (1963).

This Section Gives No Jurisdiction of Such Causes of Action. — This section provides no jurisdiction in this State for foreign transitory causes of action. *Atlantic Coast Line R.R. v. J.B. Hunt & Sons*, 260 N.C. 717, 133 S.E.2d 644 (1963); *Dillon v. Numismatic Funding Corp.*, 29 N.C. App. 513, 225 S.E.2d 137 (1976), rev'd on other grounds, 291 N.C. 674, 231 S.E.2d 629 (1977).

The provisions of this section are not available for transitory foreign causes of action. *Abney Mills v. Tri-State Motor Transit Co.*, 265 N.C. 61, 143 S.E.2d 235 (1965).

No Substituted Service on Such Corporation in Action on Foreign Tort. — If a foreign corporation, not domesticated in North Carolina, were transacting business in this State, it could not be brought into court in this State under this section by service of process upon the Secretary of State in an action based on a tort occurring in another state. *Atlantic Coast Line R.R. v. J.B. Hunt & Sons*, 260 N.C. 717, 133 S.E.2d 644 (1963).

No statute in this State authorizes service upon the Secretary of State in an action against an undomesticated foreign corporation doing business in this State for a tort committed outside this State. *Atlantic Coast Line R.R. v. J.B. Hunt & Sons*, 260 N.C. 717, 133 S.E.2d 644 (1963).

Where the defendant was doing business in this State during the time its agent was here managing a domestic carrier, but the cause of action did not arise out of business so transacted in this State, and service of process under this section by service on the Secretary of

State was a nullity. *Abney Mills v. Tri-State Motor Transit Co.*, 268 N.C. 313, 150 S.E.2d 585 (1966).

Mere Fact of Personal Service Insufficient to Create Jurisdiction. — The mere fact that there is personal service upon an officer of a foreign corporation who is present in the State is insufficient to subject a foreign corporation to the jurisdiction of the court. *Easterling v. Cooper Motors, Inc.*, 26 F.R.D. 1 (M.D.N.C. 1960).

Invocation of Benefits of Law of Forum. — A relevant inquiry is whether defendant engaged in some act or conduct by which it may be said to have invoked the benefits and protections of the law of the forum. *United States v. Atlantic Contractors, Inc.*, 231 F. Supp. 356 (E.D.N.C. 1964).

Federal court in a diversity action is bound by jurisdictional limits placed on State courts by the State legislature. *Bowman v. Curt. G. Joa, Inc.*, 361 F.2d 706 (4th Cir. 1966).

Cited in *Shew v. Royce Chem. Co.*, 5 N.C. App. 444, 168 S.E.2d 701 (1969); *Goldman v. Parkland of Dallas, Inc.*, 7 N.C. App. 400, 173 S.E.2d 15 (1970); *Koppers Co. v. Kaiser Aluminium & Chem. Corp.*, 9 N.C. App. 118, 175 S.E.2d 761 (1970); *Marshville Rendering Corp. v. Gas Heat Eng'r Corp.*, 10 N.C. App. 39, 177 S.E.2d 907 (1970).

II. TRANSACTING OR DOING BUSINESS WITHIN STATE.

A. In General.

Question of Due Process Presented. — Whether a foreign corporation is doing business in North Carolina, so as to subject it to the jurisdiction of the State's courts, is essentially a question of due process of law under the United States Constitution, Amendment 14, which must be decided in accord with the decisions of the United States Supreme Court. *Ivy River Land & Timber Co. v. National Fire & Marine Ins. Co.*, 192 N.C. 115, 133 S.E. 424 (1926); *Harrison v. Corley*, 226 N.C. 184, 37 S.E.2d 489 (1946); *Putnam v. Triangle Publications, Inc.*, 245 N.C. 432, 96 S.E.2d 445 (1957).

Effect of Change from "Doing Business" to "Transacting Business". — Prior to 1955, the statute comparable to the present section required that a foreign corporation be "doing business" in this State, and most of the decisions of the North Carolina Supreme Court are under this earlier statute. However, it is generally considered that changing the statute from "doing business" to "transacting business" only had the effect of liberalizing it. *Worley's Beverages, Inc. v. Bubble Up Corp.*, 167 F. Supp. 498 (E.D.N.C. 1958); *Abney Mills v. Tri-State Motor Transit Co.*, 265 N.C. 61, 143 S.E.2d 235 (1965).

The present section was enacted after the landmark decision in *International Shoe Co. v. Washington*, 326 U.S. 310, 66 S. Ct. 154, 90 L. Ed. 95 (1945), wherein the old jurisdictional tests of "consent," "presence," and "doing business" were discarded and a qualitative test of "minimum contacts" was established for determining the constitutional limits on a state court's jurisdictional reach. Former § 55-38 had used the phrase "doing business," which was replaced with this section and § 55-144 and their "transacting business" phraseology which is more liberal than the previous "doing business." *Bowman v. Curt G. Joa, Inc.*, 361 F.2d 706 (4th Cir. 1966).

The meaning of the expression "doing business in this State," as used in former § 55-38, is also accurate as to the meaning of "shall transact business in this State," as used in this section. *Abney Mills v. Tri-State Motor Transit Co.*, 265 N.C. 61, 143 S.E.2d 235 (1965).

What Constitutes Transacting Business. — Transacting business within the State is defined as the transaction within the State of some substantial part of a party's ordinary business, which must be continuous in the sense that it is distinguished from merely casual or occasional transactions, and must be of such a character as will give rise to some form of legal obligations. *Abney Mills v. Tri-State Motor Transit Co.*, 265 N.C. 61, 143 S.E.2d 235 (1965).

In *Abney Mills v. Tri-State Motor Transit Co.*, 265 N.C. 61, 143 S.E.2d 235 (1965), "transacting business" was construed as activities in North Carolina which are "'substantial,' 'continuous and systematic,' and 'regular,' as distinguished from 'casual,' 'single' or 'isolated acts.'" *Bowman v. Curt G. Joa, Inc.*, 361 F.2d 706 (4th Cir. 1966).

Definition of "transacting business" set forth in § 55-131 is applicable to this section, and any cases determined under this section are relevant in considering the applicability of § 55-131. *Snelling & Snelling, Inc. v. Watson*, 41 N.C. App. 193, 254 S.E.2d 785 (1979).

What Constitutes Doing Business. — The expression "doing business in this State" means engaging in, carrying on or exercising, in this State, some of the things, or some of the functions, for which the corporation was created. *Radio Station WMFR, Inc. v. Eitel-McCullough, Inc.*, 232 N.C. 287, 59 S.E.2d 779 (1950); *Troy Lumber Co. v. State Sewing Mach. Corp.*, 233 N.C. 407, 64 S.E.2d 415 (1951); *Harrington v. Croft Steel Prods., Inc.*, 244 N.C. 675, 94 S.E.2d 803 (1956); *Worley's Beverages, Inc. v. Bubble Up Corp.*, 167 F. Supp. 498 (E.D.N.C. 1958); *Abney Mills v. Tri-State Motor Transit Co.*, 265 N.C. 61, 143 S.E.2d 235 (1965).

The phrase "doing business in this State" is not susceptible of an all embracing definition, and each case must be decided upon the

particular facts therein appearing, the general criteria being that a foreign corporation is doing business in this State if it transacts in this State the business it was created and authorized to do, through representatives in this State, and thus is present in this State through the person of its representatives. *Parris v. H.G. Fischer & Co.*, 219 N.C. 292, 13 S.E.2d 540 (1941).

Where a corporation is engaging in, carrying on, and exercising in this State some of the functions for which it was created, which are of such character and extent as to warrant the inference that it has subjected itself to the jurisdiction and laws of the State, this section, providing for substituted service on the Secretary of State, is applicable. *Troy Lumber Co. v. State Sewing Mach. Corp.*, 233 N.C. 407, 64 S.E.2d 415 (1951).

Doing business in this State means doing some of the things or exercising some of the functions in this State for which the corporation was created. *Spartan Equip. Co. v. Air Placement Equip. Co.*, 263 N.C. 549, 140 S.E.2d 3 (1965); *Abney Mills v. Tri-State Motor Transit Co.*, 265 N.C. 61, 143 S.E.2d 235 (1965).

The business done by the corporation in this State must be of such nature and character as to warrant the inference that the corporation has subjected itself to the local jurisdiction and is, by its duly authorized officers and agents, present within the State. *Spartan Equip. Co. v. Air Placement Equip. Co.*, 263 N.C. 549, 140 S.E.2d 3 (1965); *Abney Mills v. Tri-State Motor Transit Co.*, 265 N.C. 61, 143 S.E.2d 235 (1965).

What Constitutes Within the State. — A foreign corporation cannot be held to be doing business in a state, and therefore subject to its laws, unless it shall be found as a fact that such corporation has entered the state in which it is alleged to be doing business and there transacted, by its officers, agents or other persons authorized to act for it, the business in which it is authorized to engage by the state under whose laws it was created and organized. The presence within the state of such officers, agents or other persons, engaged in the transaction of the corporation's business with citizens of the state, is generally held as determinative of the question as to whether the corporation is doing business in the state. *Radio Station WMFR, Inc. v. Eitel-McCullough, Inc.*, 232 N.C. 287, 59 S.E.2d 779 (1950).

In determining the question whether a foreign corporation is doing business within a state, so as to be subject to its jurisdiction, and, to the end that such jurisdiction may be exercised, subject to service of process from its courts, in accordance with statutory provisions for such service, the foreign corporation must have entered the state and must have been within the state during the time such business was transacted. *Ivy River Land & Timber Co. v.*

National Fire & Marine Ins. Co., 192 N.C. 115, 133 S.E. 424 (1926).

Presence in the State has never been doubted when the activities of the corporation there have not only been continuous and systematic, but also give rise to the liabilities sued on, even though no consent to be sued or authorization to an agent to accept service of process has been given. *Abney Mills v. Tri-State Motor Transit Co.*, 265 N.C. 61, 143 S.E.2d 235 (1965).

Continuity of Conduct. — While the phrase "doing business in this State" connotes some degree of continuity, and an isolated instance is insufficient to support service of process, evidence that defendant nonresident corporation maintained dealer-representatives in this State, and that in the particular instance in suit the corporation was doing business in this State through its dealer-representative, is sufficient to support service of process, since the fact that defendant employed dealer-representatives for the purpose of selling its products and carrying on its business, presumably in a similar manner, implies a sufficient continuity of conduct within the purview of the statute. *Parris v. H.G. Fischer & Co.*, 219 N.C. 292, 13 S.E.2d 540 (1941).

Where a foreign corporation has been continuously and systematically for several years doing business in North Carolina and exercising in this State some of the functions for which it was created, and has such substantial contacts within the State that the maintenance of a suit in personam does not offend traditional notions of fair play and substantial justice, it is proper to refuse to quash service of process. *Spartan Equip. Co. v. Air Placement Equip. Co.*, 263 N.C. 549, 140 S.E.2d 3 (1965).

An isolated instance of business activity or casual acts are not sufficient to support service on the Secretary of State pursuant to this section. *Canterbury v. Monroe Lange Hardwood Imports*, 48 N.C. App. 90, 268 S.E.2d 868 (1980).

Outside the purview of this section are sporadic activities of a foreign corporation which are not directly in performance of its charter functions, or which are not of such a character as to indicate a course of business which might be expected to recur as opportunity offered; but the nature of the activities themselves, their magnitude, the multiplicity of contracts, the possibility that incidents may occur and liabilities be created — especially where the entrance into the State is in the ordinary prosecution of the business which the corporation is chartered to carry on and is carrying on, and which definitely regards the State as a theater for future transactions of a like sort as often as occasion might arise — these are important considerations in determining whether a corporation is, in a given instance, doing business in the State. On a single

visitation to the State the matter in hand may explode into a multitude of transactions of far-reaching importance. *State Hwy. & Pub. Works Comm'n v. Diamond S.S. Transp. Corp.*, 225 N.C. 198, 34 S.E.2d 78 (1945).

Discontinuance of Business. — This section authorizes service of process on the Secretary of State, in an action by a resident of this State against a foreign corporation after the business once carried on by defendant has been discontinued. *State Hwy. & Pub. Works Comm'n v. Diamond S.S. Transp. Corp.*, 225 N.C. 198, 34 S.E.2d 78 (1945).

The provisions for service of summons under the statute are a condition on which a foreign corporation is allowed to do business, and are accepted by it when it enters the State and engages in business without domesticating or appointing a process agent. It cannot, by the simple expedient of closing shop and departing the jurisdiction, withdraw such assent so as to defeat a suit on a cause of action which arose while it was engaged in business. *Harrison v. Corley*, 226 N.C. 184, 37 S.E.2d 489 (1946).

Transacting Business Is a Question of Fact. — No all-embracing rule as to what is the meaning of "shall transact business in this State" has been formulated. This question must be determined largely according to the facts of each individual case rather than by the application of fixed, definite, and precise rules. *Abney Mills v. Tri-State Motor Transit Co.*, 265 N.C. 61, 143 S.E.2d 235 (1965).

The validity of service of summons under this section, as well as the satisfaction of due process, must be largely determined by a factual evaluation of the nature and extent of the business of the defendant. *Schnur & Cohan, Inc. v. McDonald*, 220 F. Supp. 9 (M.D.N.C. 1963), appeal dismissed, 328 F.2d 103 (4th Cir. 1964).

Whether the type of activity conducted within the State is adequate to satisfy the "transacting business" requirements depends upon the facts of the particular case. *United States v. Atlantic Contractors, Inc.*, 231 F. Supp. 356 (E.D.N.C. 1964).

The question of whether a company is transacting business within the State cannot be answered by applying a mechanical formula or rule of thumb, but only by ascertaining what is fair and reasonable and just in the circumstances. *United States v. Atlantic Contractors, Inc.*, 231 F. Supp. 356 (E.D.N.C. 1964).

No satisfactory general definition can be made of the phrase "doing business" as found in former § 55-38, and, generally speaking, each case must be determined on its own facts. The question is one of fact, and must be determined largely according to the facts of each individual case, rather than by the application of fixed, definite and precise rules. *State Hwy. & Pub. Works Comm'n v. Diamond S.S. Transp. Corp.*, 225 N.C. 198, 34 S.E.2d 78 (1945).

The question as to doing business is one of fact, and must be determined largely according to the facts of each individual case, rather than by the application of fixed, definite and precise rules. In the last analysis, the question is one of due process of law under the Constitution of the United States. *Ivy River Land & Timber Co. v. National Fire & Marine Ins. Co.*, 192 N.C. 115, 133 S.E. 424 (1926); *Harrison v. Corley*, 226 N.C. 184, 37 S.E.2d 489 (1946).

Findings of fact should be made so that it could be determined whether or not activities by the defendant in this State were "substantial," "continuous and systematic," and "regular," as distinguished from "casual," "single," or "isolated acts," and that defendant by such activities was transacting business in this State under the relevant rules of law and within the intent and meaning of this section. *Abney Mills v. Tri-State Motor Transit Co.*, 265 N.C. 61, 143 S.E.2d 235 (1965).

Conclusiveness of Trial Court Finding. — Where there is evidence to show that a foreign corporation was doing business in this State at the time the summons in the action was served on the Secretary of State, but there is also ample evidence to the contrary, a finding by the trial court that the corporation was not so doing business is conclusive and not subject to review of the Supreme Court. *Brown v. Tennessee Coal, Iron & R.R.*, 208 N.C. 50, 178 S.E. 858 (1935).

Findings Reviewable on Appeal. — Whether a corporation is "doing business" in this State is an inference of law and of fact to be drawn from the specific facts found, and is subject to review on appeal. *Radio Station WMFR, Inc. v. Eitel-McCullough, Inc.*, 232 N.C. 287, 59 S.E.2d 779 (1950).

B. Activity Constituting Business within State.

Transacting Business of Domestic Subsidiary in State. — Where a foreign corporation acquires and holds controlling stock interest in a domestic corporation, and comes into the state where the domestic corporation is created and doing business, and there itself by its officer or officers transacts business of the domestic corporation and manages and controls its internal affairs, then such foreign corporation is doing business within the domestic state and is subject to the jurisdiction of its courts. *Abney Mills v. Tri-State Motor Transit Co.*, 265 N.C. 61, 143 S.E.2d 235 (1965).

Foreign Corporation with Licensees in State. — A foreign corporation which received substantial royalties from 14 of 23 licensees located in this State and which adopted a program of sending auditors into the State to examine the books and records of its licensees was engaged in the transaction of business in North Carolina. *Throwing Corp. of Am. v.*

Deering Milliken Research Corp., 302 F. Supp. 487 (M.D.N.C. 1969).

Foreign Banking Corporation. — A foreign banking corporation which sends its agents here for the purpose of investigating and looking after properties in its capacity as trustee, does business in the State, "doing business in this State" meaning engaging in, carrying on or exercising in this State some of the functions for which the corporation was created. *Ruark v. Virginia Trust Co.*, 206 N.C. 564, 174 S.E. 441 (1934).

Insurance Business. — A foreign company acquiring membership of persons in North Carolina for life insurance, without soliciting agents to whom policies are issued, upon a mutual benefit plan and kept in force by the payments of dues, is doing a life insurance business here in contemplation of this section, and valid service of summons may be had on such corporation upon compliance with the provisions of the statute in respect thereto. *Lunceford v. Commercial Travelers Mut. Accident Ass'n of Am.*, 190 N.C. 314, 129 S.E. 805 (1925).

The issuance of one or more policies of fire insurance, by a corporation created and existing under the laws of another state, and not authorized to do business in this State, insuring citizens of this State against loss or damage by fire to property situate in this State, the contracts for such policies having been made, and the premiums having been paid in the state in which the foreign corporation has its principal office and place of business, not by or through any agent of such corporation or person authorized to act for it in this State, does not constitute "doing business" in this State of North Carolina within the meaning of these words in the former statute. *Ivy River Land & Timber Co. v. National Fire & Marine Ins. Co.*, 192 N.C. 115, 133 S.E. 424 (1926).

Appraisal Business. — Where defendant was in the appraisal business and was soliciting and performing appraisal work in North Carolina, it was thus transacting and performing in this State the business for which it was created. *Crabtree v. Coats & Burchard Co.*, 7 N.C. App. 624, 173 S.E.2d 473 (1970).

Vessel Discharging Cargo at State Port. — Where a vessel of defendant foreign corporation, a regular carrier of freight in the coastwise trade, entered the port of Wilmington and discharged a substantial part of its valuable cargo in the regular course of business, and was there damaged by striking a bridge and remained some months in said port, undergoing repairs and having considerable business dealings with local residents, the service of process upon the Secretary of State was valid and sufficient to bring defendant into court. *State Hwy. & Pub. Works Comm'n v. Diamond S.S. Transp. Corp.*, 225 N.C. 198, 34 S.E.2d 78 (1945).

Lessor of Airports. — Where defendant foreign corporation leased airports to individual defendant and by terms of agreement lessor was to furnish planes, parts, repairs, etc., to provide insurance for airports to be operated in name of corporate defendant, with right to demand that lessee devote full time to business, and to furnish forms for keeping records, that corporation was doing business in this State so as to subject it to jurisdiction of courts and process served on it under this section was valid. *Harrison v. Corley*, 226 N.C. 184, 37 S.E.2d 489 (1946).

C. Activity Not Constituting Business within State.

Taking Orders and Delivering Goods in State. — A foreign corporation which merely takes orders in this State to be transmitted to its home office for acceptance and shipment of its goods into this State by common carrier is not doing business here within the meaning of this section and § 55-143, but if it transports its goods to this State in its own trucks and thus completes the transaction by making deliveries here, it performs here one of its essential purposes and is doing business here within the purview of the statute. *Harrington v. Croft Steel Prods., Inc.*, 244 N.C. 675, 94 S.E.2d 803 (1956).

Mere Incidental Services. — Mere incidental services not substantially of the character of the business carried on by a foreign corporation are not of the nature to subject it to the control and regulation of the state law or to invoke state law for its protection. *Radio Station WMFR, Inc. v. Eitel-McCullough, Inc.*, 232 N.C. 287, 59 S.E.2d 779 (1950); *Worley's Beverages, Inc. v. Bubble Up Corp.*, 167 F. Supp. 498 (E.D.N.C. 1958).

Occasional Visits and Communications. — Occasional visits by an out-of-state car dealer to the regional office of the manufacturer in North Carolina, for the purpose of viewing new model automobiles, or taking customers who wished to purchase some particular type of automobile or truck which the defendant did not have at its place of business, and occasional communications with said regional office by telephone, telegram, or letter, fall far short of the "minimum contacts" required to subject a foreign corporation to jurisdiction of the courts of this State. *Easterling v. Cooper Motors, Inc.*, 26 F.R.D. 1 (M.D.N.C. 1960).

Single-Item Sales Contract Following Engineering Consultant Services. — The facts amount to two intermittent acts: (1) The contract to supply engineering consultant services to a furniture manufacturer. The work was not shown to have been performed within the State of North Carolina; performance in that contract was completed at least a year prior to the events involved in the case at bar;

and the action here in suit did not arise out of that consultant contract. (2) The negotiation of the single-item sales contract involved in the case at bar. These activities fall outside this section. *Bowman v. Curt G. Joa, Inc.*, 361 F.2d 706 (4th Cir. 1966).

Breach of Contract outside State. — Because a cause of action for breach of contract arises at the time the breach occurs, where the breach occurred outside this State, this section does not apply. *Dillon v. Numismatic Funding Corp.*, 29 N.C. App. 513, 225 S.E.2d 137 (1976), rev'd on other grounds, 291 N.C. 674, 231 S.E.2d 629 (1977).

Ownership or Control of Subsidiary Doing Business in State. — Generally, it has been held or recognized that the mere ownership or control by a foreign corporation through a majority stock ownership of the stock of another corporation which is doing business within a state, either resident or domesticated, does not, in and of itself, constitute doing business within the state by the foreign corporation for the service of process so as to subject it to the State's jurisdiction, where the foreign corporation is not created for the very purpose of holding such stock and the two corporations remain distinct entities. *Abney Mills v. Tri-State Motor Transit Co.*, 265 N.C. 61, 143 S.E.2d 235 (1965).

Employment of Soliciting Agent. — Where nonresident defendant corporation employed a soliciting agent who took orders and forwarded them to the home office in another state, and the contract in suit was entered into in the state where the home office was situated, the defendant was not doing business in this State for the purpose of service of process on it by service on the Secretary of State. *Plott v. Michael*, 214 N.C. 665, 200 S.E. 429 (1939).

While the salesmen did some promotional work, and attempted to create goodwill for their company, and perhaps on occasions rendered engineering service or advice to customers, their principal and significant duties consisted of soliciting orders for acceptance at the home office and this did not constitute transacting business. *Schnur & Cohan, Inc. v. McDonald*, 220 F. Supp. 9 (M.D.N.C. 1963), appeal dismissed, 328 F.2d 103 (4th Cir. 1964).

Sales Representative with Limited Authority. — Findings that a foreign corporation, engaged in the business of manufacturing certain goods and selling them direct to retail distributors in this State, maintained a sales representative here to aid in promotion of sales to dealer representatives and facilitate sales directly to customers in company with dealer representatives, and an agent, to investigate complaints by purchasers who is without authority to compromise or adjust them, its established procedure being for the customer to return defective merchandise directly to the

corporation, and also an agent here to facilitate the collection of delinquent or slow accounts owed by dealer representatives, without evidence that such agent had authority to collect or receive money on behalf of the corporation were insufficient to support the conclusion that it was doing business in this State for the purpose of service of summons. *Radio Station WMFR, Inc. v. Eitel-McCullough, Inc.*, 232 N.C. 287, 59 S.E.2d 779 (1950).

Foreign Publishing Company Shipping Magazines into State. — A foreign publishing

company which delivers to a common carrier in another state magazines for shipment to a wholesale dealer in this State for resale in this State by the dealer, with provision for credit to the dealer for unsold magazines, and which employs sales promotion representatives who make occasional visits in this State, is not doing business in this State for the purpose of service of process by service upon the Secretary of State. *Putnam v. Triangle Publications, Inc.*, 245 N.C. 432, 96 S.E.2d 445 (1957).

§ 55-145. Jurisdiction over foreign corporations not transacting business in this State.

(a) Every foreign corporation shall be subject to suit in this State, whether or not such foreign corporation is transacting or has transacted business in this State and whether or not it is engaged exclusively in interstate or foreign commerce, on any cause of action arising as follows:

- (1) Out of any contract made in this State or to be performed in this State; or
- (2) Out of any business solicited in this State by mail or otherwise if the corporation has repeatedly so solicited business, whether the orders or offers relating thereto were accepted within or without the State; or
- (3) Out of the production, manufacture, or distribution of goods by such corporation with the reasonable expectation that those goods are to be used or consumed in this State and are so used or consumed, regardless of how or where the goods were produced, manufactured, marketed, or sold or whether or not through the medium of independent contractors or dealers; or
- (4) Out of tortious conduct in this State, whether arising out of repeated activity or single acts, and whether arising out of misfeasance or nonfeasance.

(b) Whenever a foreign parent corporation is subject to liability for any obligations of a subsidiary corporation that is subject to suit in this State, the parent corporation is itself so subject in any action to enforce the said liability. In any such action against a foreign corporation, service may be made on any person who could be served in an action against such subsidiary corporation.

(c) Any foreign corporation subject to suit under this section may, even though it is not transacting business in this State, appoint and maintain a registered agent, which agent may be either an individual resident in this State, or a domestic corporation, or a foreign corporation authorized to transact business in this State. Such appointment shall take place by filing in the office of the Secretary of State a statement setting forth the name and address of the corporation and the address of its principal office, and the name and address in this State of the registered agent. The registered agent appointed by a foreign corporation pursuant to this section shall be an agent of the corporation upon whom any process, notice, or demand in any cause of action arising under this section may be served. In any case where a foreign corporation is subject to suit under this section and has failed to appoint and maintain a registered agent upon whom process might be served, or whenever such registered agent cannot with reasonable diligence be found at the address given, then the Secretary of State shall be an agent of such corporation upon whom any process in any such cause of action may be served. (1955, c. 1143; c. 1371, s. 1; 1973, c. 469, s. 43.)

Legal Periodicals. — For survey of case law on conflict of laws, see 43 N.C.L. Rev. 895 (1965).

For note on jurisdiction over foreign corporations not qualified to transact business in North Carolina, see 44 N.C.L. Rev. 449 (1966).

For comment on jurisdiction over foreign corporations not transacting business in North Carolina, see 2 Wake Forest Intra. L. Rev. 1 (1966).

For note on choice of law rules in North Carolina, see 48 N.C.L. Rev. 243 (1970).

For note on personal jurisdiction over foreign

corporations based upon making a contract in North Carolina, see 49 N.C.L. Rev. 838 (1971).

For article, "Recognition of Foreign Judgments," see 50 N.C.L. Rev. 21 (1971).

For survey of 1973 case law with regard to in personam jurisdiction over out-of-state corporations, see 52 N.C.L. Rev. 850 (1974).

For survey of 1976 case law on civil procedure, see 55 N.C.L. Rev. 914 (1977).

For article entitled, "Foreign Corporations in North Carolina: The 'Doing Business' Standards of Qualification, Taxation, and Jurisdiction," see 16 Wake Forest L. Rev. 711 (1980).

CASE NOTES

- I. General Consideration.
- II. Minimum Contacts.
- III. Contracts Made or Performed in State.
- IV. Solicitation of Business in State.
- V. Goods Expected to be Used or Consumed in State.
- VI. Torts.

I. GENERAL CONSIDERATION.

Editor's Note. — Many of the cases cited below were decided under former § 55-38.1.

Burden of Suing Away from Home Need Not Always Fall on Plaintiff. — There is almost always some hardship to the party required to litigate away from home. But there is no constitutional requirement that this hardship must invariably be borne by the plaintiff whenever the defendant is a nonresident. *Byham v. National Cibo House Corp.*, 265 N.C. 50, 143 S.E.2d 225 (1965).

Form of Substituted Service Must Give Reasonable Assurance of Notice. — The form of substituted service adopted by the forum state must give reasonable assurance that the notice to defendant will be actual. *Byham v. National Cibo House Corp.*, 265 N.C. 50, 143 S.W.2d 225 (1965).

As Does Form in This State. — The form of substituted service adopted by this State gives reasonable assurance that a defendant would be given actual notice. *Goldman v. Parkland of Dallas, Inc.*, 277 N.C. 223, 176 S.E.2d 784 (1970).

Failure to Provide for Service on Foreign Corporations Does Not Deny Due Process. — It is essential to determine the extent to which the legislature of the forum state has given authority to its courts to entertain litigation against foreign corporations. Provisions for making foreign corporations subject to service in the forum state is a matter of legislative discretion, and a failure to provide for such service is not a denial of due process. *Byham v. National Cibo House Corp.*, 265 N.C. 50, 143 S.E.2d 225 (1965).

Cause of Action Must Arise in State Out of One of Delineated Activities. — This sec-

tion confers jurisdiction over any cause of action arising out of any one of four specific and well-delineated activities. If one of these four activities is present but the cause of action arises elsewhere, or if none of the four activities is present although others may be present, there is no jurisdictional grant. *Bowman v. Curt G. Joa, Inc.*, 361 F.2d 706 (4th Cir. 1966).

If one of the four activities listed in subsection (a) of this section is present but the cause of action arises elsewhere, or if none of the four activities is present although others may be present, there is no jurisdictional grant. *H.V. Allen Co. v. Quip-Matic, Inc.*, 47 N.C. App. 40, 266 S.E.2d 768, cert. denied and appeal dismissed, 301 N.C. 85, 273 S.E.2d 298 (1980).

Any Subdivision of Subsection (a) Forms Basis for Jurisdiction. — Any one of the subdivisions of subsection (a) of this section is valid as the sole basis for granting jurisdiction. *Marshville Rendering Corp. v. Gas Heat Eng'r Corp.*, 10 N.C. App. 39, 177 S.E.2d 907 (1970).

Section Applicable Only to Local Actions. — The jurisdiction created by this section pertains only to local actions and has no application to any cause of action arising outside the State. *Atlantic Coast Line R.R. v. J.B. Hunt & Sons*, 260 N.C. 717, 133 S.E.2d 644 (1963); *Marshville Rendering Corp. v. Gas Heat Eng'r Corp.*, 10 N.C. App. 39, 177 S.E.2d 907 (1970).

This section has been construed to apply only as to "local actions," i.e., causes of action which arise in this State. *Munchak Corp. v. Riko Enterprises, Inc.*, 368 F. Supp. 1366 (M.D.N.C. 1973).

This section only applies to actions arising in North Carolina. *Dillon v. Numismatic Funding Corp.*, 29 N.C. App. 513, 225 S.E.2d 137 (1976),

rev'd on other grounds, 291 N.C. 674, 231 S.E.2d 629 (1977).

But Applies to Foreign Corporations Not Transacting Business in State. — This section governs jurisdiction over foreign corporations not transacting business in this State. *Atlantic Coast Line R.R. v. J.B. Hunt & Sons*, 260 N.C. 717, 133 S.E.2d 644 (1963).

Foreign corporations are by this section made subject to local suits by residents of this State in some situations where they have engaged in specified activity giving rise to a cause of action locally, even though they are not so "transacting business" as to be required to obtain a certificate of authority. *Atlantic Coast Line R.R. v. J.B. Hunt & Sons*, 260 N.C. 717, 133 S.E.2d 644 (1963); *Marshville Rendering Corp. v. Gas Heat Eng'r Corp.*, 10 N.C. App. 39, 177 S.E.2d 907 (1970).

By its terms, this section applies to foreign corporations not transacting business in North Carolina and so seems to be intended to take advantage of the liberal constitutional limits provided by the decision in *International Shoe Co. v. Washington*, 326 U.S. 310, 66 S. Ct. 154, 90 L. Ed. 95, 161 A.L.R. 1057 (1945). *Bowman v. Curt G. Joa, Inc.*, 361 F.2d 706 (4th Cir. 1966).

Subsection (a) of this section is applicable to foreign corporations which are not transacting business in North Carolina but who come within the purview of any one of the four specific and well-delineated areas listed therein. *Goldman v. Parkland of Dallas, Inc.*, 7 N.C. App. 400, 173 S.E.2d 15, aff'd, 277 N.C. 223, 176 S.E.2d 784 (1970).

Cause of Action Arising outside of State Cannot Be Basis for Jurisdiction. — Where the cause of action arises outside of North Carolina, jurisdiction cannot be obtained under subsection (a) of this section. *Marshville Rendering Corp. v. Gas Heat Eng'r Corp.*, 10 N.C. App. 39, 177 S.E.2d 907 (1970).

Benefit and Protection of State Law Gives Rise to Obligations. — To the extent that a corporation exercises the privilege of conducting activities within a state, it enjoys the benefits and protection of the laws of that state. The exercise of that privilege may give rise to obligations, and, so far as those obligations arise out of and are connected with the activities within the state, a procedure which requires the corporation to respond to a suit brought to enforce them can, in most instances, hardly be said to be undue. *Byham v. National Cibo House Corp.*, 265 N.C. 50, 143 S.E.2d 225 (1965).

Where foreign corporation obviously uses, benefits from, or can easily use the laws of North Carolina, jurisdiction will lie. *Staley v. Homeland, Inc.*, 368 F. Supp. 1344 (E.D.N.C. 1974).

Defendant Must Have Purposely Availed Itself of Privilege of Conducting Activities.

— It is essential in each case that there be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum state, thus invoking the benefits and protection of its law. *Byham v. National Cibo House Corp.*, 265 N.C. 50, 143 S.E.2d 225 (1965); *Equity Assocs. v. Society for Sav.*, 31 N.C. App. 182, 228 S.E.2d 761 (1976), cert. denied, 291 N.C. 711, 232 S.E.2d 203 (1977).

Regardless of what other contacts may be present. *Equity Assocs. v. Society for Sav.*, 31 N.C. App. 182, 228 S.E.2d 761 (1976), cert. denied, 291 N.C. 711, 232 S.E.2d 203 (1977).

Invoking Privilege of Conducting Business. — By entering into a contract made in this State and to be performed in part in this State, a defendant foreign corporation avails itself of the privilege of conducting its business in this State thus invoking the benefits and protection of its laws. *Goldman v. Parkland of Dallas, Inc.*, 277 N.C. 223, 176 S.E.2d 784 (1970).

Right of State to Require Answer to Claims. — Where the solicited circulation of a corporation's publications account for a relatively significant portion of the corporation's revenue, notions of fair play and substantial justice support the right of the State to require the corporation to answer nonfrivolous claims arising out of its contacts with the State, even though it has managed to reduce its physical presence in the State to a minimum. *Johnston v. Time, Inc.*, 321 F. Supp. 837 (M.D.N.C. 1970), modified, 448 F.2d 378 (4th Cir. 1971).

Size of Claim Is Pertinent. — When claims are small or moderate, individual claimants frequently cannot afford the cost of bringing an action in a foreign forum, thus placing the foreign corporation beyond the reach of the claimant. Whether this is the situation in a given case is pertinent. *Byham v. National Cibo House Corp.*, 265 N.C. 50, 143 S.E.2d 225 (1965).

As Is Presence of Witnesses and Evidence. — Consideration should be given to the question whether the crucial witnesses and material evidence are to be found in the forum state. *Byham v. National Cibo House Corp.*, 265 N.C. 50, 143 S.E.2d 225 (1965).

And Inconvenience to Corporation. — An estimate of the inconveniences which would result to the corporation from a trial away from its home or principal place of business is relevant. *Byham v. National Cibo House Corp.*, 265 N.C. 50, 143 S.E.2d 225 (1965).

And State's Interest in Protecting Residents. — Consideration should be also given to any legitimate interest the State has in protecting its residents with respect to the activities and contacts of the foreign corporation. *Byham v. National Cibo House Corp.*, 265 N.C. 50, 143 S.E.2d 225 (1965).

This State has a legitimate interest in the establishment and operation of enterprises and trade within its borders and the protection of its residents in the making of contracts with persons and agents who enter the State for that purpose. *Byham v. National Cibo House Corp.*, 265 N.C. 50, 143 S.E.2d 225 (1965).

And Whether State's Courts Are Open to Suits by Foreign Corporation. — Consideration should be given to the question whether the courts of the forum state are open to the foreign corporation to enforce obligations of residents of such state created by the activities and contacts of the corporation. *Byham v. National Cibo House Corp.*, 265 N.C. 50, 143 S.E.2d 225 (1965).

As They Are in This State. — The courts of the State have been and now are open to a foreign corporation for protection of its activities and to enforce the valid obligations which residents of this State have assumed by reason of defendant's contacts and activities. *Byham v. National Cibo House Corp.*, 265 N.C. 50, 143 S.E.2d 225 (1965).

Nonresident has access to the courts of this State and can sue a foreign corporation. *Marshville Rendering Corp. v. Gas Heat Eng'r Corp.*, 10 N.C. App. 39, 177 S.E.2d 907 (1970).

Statutes relating to foreign corporations have no application to individuals. *Edwards v. Scott & Fetzer, Inc.*, 154 F. Supp. 41 (M.D.N.C. 1957).

In Personam Jurisdiction. — Where this section is applicable, the assumption of in personam jurisdiction of a defendant by a North Carolina court, pursuant to subsection (a) of this section, would not offend the due process clause of the Constitution of the United States. *Marshville Rendering Corp. v. Gas Heat Eng'r Corp.*, 10 N.C. App. 39, 177 S.E.2d 907 (1970).

In Personam Judgment Authorized under Section. — Where a cause of action stated in a complaint or a cross action arises out of a transaction which falls within the terms of this section and service of process is had under § 55-146, the defendant is brought within the jurisdiction of the court for purposes of an in personam judgment. *Farmer v. Ferris*, 260 N.C. 619, 133 S.E.2d 492 (1963).

Upon a finding that an action grows out of a contract to be performed within this State, in personam jurisdiction of the corporate defendant is sustained. *Throwing Corp. of Am. v. Deering Milliken Research Corp.*, 302 F. Supp. 487 (M.D.N.C. 1969).

Personal Service Alone Insufficient to Subject Foreign Corporation to Jurisdiction. — The mere fact that there is personal service upon an officer of a foreign corporation who is present in the State is insufficient to subject a foreign corporation to the jurisdiction of the court. *Easterling v. Cooper Motors, Inc.*,

26 F.R.D. 1 (M.D.N.C. 1960).

Jurisdiction over Assignee of Contract.

— The assignee of the proceeds of a construction contract "to be performed in this State," an Alabama bank, was not subject to the courts' jurisdiction under the contract, where the assignee was not a party to the contract and had incurred no duties or liabilities thereunder. *Koppers Co. v. Kaiser Aluminum & Chem. Corp.*, 9 N.C. App. 118, 175 S.E.2d 761 (1970).

Assignee of contract, assumes, with full knowledge of the pendency of a lawsuit, a portion of the obligations under the contract, and it steps into the shoes of the assignor and thus comes within the statutory criteria for "long-arm" jurisdiction. *Munchak Corp. v. Caldwell*, 25 N.C. App. 652, 214 S.E.2d 194, cert. denied, 287 N.C. 664, 216 S.E.2d 907 (1975).

Federal court in a diversity action is bound by the jurisdictional limits placed on the North Carolina courts by the State Legislature. *Bowman v. Curt G. Joa, Inc.*, 361 F.2d 706 (4th Cir. 1966).

What Agents May Be Served with Process. — An agent through whom the corporation may be served with process is one who exercises some control over and discretionary power in respect to the corporate functions of the company. He is one who stands in the shoes of the corporation in relation to the matters of the corporation committed to his care. He must represent it in a general or limited capacity. He is the alter ego of the corporation. *Edwards v. Scott & Fetzer, Inc.*, 154 F. Supp. 41 (M.D.N.C. 1957).

Whether Distributor Is an Agent Depends on His Authority. — Where title to machines passed from foreign corporation to distributor in this State on cash purchases or C.O.D. order with draft attached and he was in full control of the ways and means of reselling them, he was not an agent of the corporation for service of process. *Edwards v. Scott & Fetzer, Inc.*, 154 F. Supp. 41 (M.D.N.C. 1957).

Casual Presence or Isolated Activity of Agent. — The casual presence of the corporate agent or even his conduct of single or isolated activity in a state in the corporation's behalf are not enough to subject it to suit on causes of action unconnected with the activities there. *Byham v. National Cibo House Corp.*, 265 N.C. 50, 143 S.E.2d 225 (1965).

If a corporation had insufficient contact or relations with North Carolina to warrant the assertion of jurisdiction over it, the entry of its agent on an isolated occasion to discuss the claim could not supply the necessary tie to give the State power. *Erlanger Mills, Inc. v. Cohoes Fibre Mills, Inc.*, 239 F.2d 502 (4th Cir. 1956).

Where an agent was acting in behalf of defendant in negotiating a contract in this State with plaintiff, and it was reasonable to

infer that plaintiff's letter to defendant, in response to the advertisement in the local paper, was referred to the agent by defendant; where the agent wrote plaintiff on defendant's stationery and arranged a meeting; where plaintiff's signature to the contract was obtained, defendant accepted it and thereby accepted the benefits of the agent's activities and ratified them; and where defendant, as its initial step in performing the contract, sent a representative to this State to assist in procuring a location for plaintiff's business, it did not lie in the mouth of defendant to say that it had no contacts with this State. *Byham v. National Cibo House Corp.*, 265 N.C. 50, 143 S.E.2d 225 (1965).

Agent's Activities Not Amounting to Doing Business. — A mere salesman or broker who takes orders and sends them to a foreign corporation for acceptance, or a distributor who buys and takes title to the chattels, is not a managing or local agent and does not result in the corporation doing business in this State. *Edwards v. Scott & Fetzer, Inc.*, 154 F. Supp. 41 (M.D.N.C. 1957).

First Amendment Considerations Are Relevant but Do Not Bar Jurisdiction. — *New York Times Co. v. Conner*, 365 F.2d 567 (5th Cir. 1966), does not stand for the proposition that, because of the constitutional protection of the dissemination of ideas, a publisher may never be sued for libel in a state other than that of publication. Rather, Conner indicates that First Amendment considerations are a factor relevant to a determination of the jurisdictional question; and the discussion of that factor in Conner must be viewed in its factual context. *Johnston v. Time, Inc.*, 321 F. Supp. 837 (M.D.N.C. 1970), modified, 448 F.2d 378 (4th Cir. 1971).

And Such Considerations Are Minimized. — In a libel action against a national magazine publisher, the First Amendment was not totally disregarded in the context of the jurisdictional question under this section, but the consideration given it was minimized. *Johnston v. Time, Inc.*, 321 F. Supp. 837 (M.D.N.C. 1970), modified, 448 F.2d 378 (4th Cir. 1971).

In the jurisdictional context, a nonresident defendant publisher has the protection of the rights guaranteed to it by the due process clause of the Fourteenth Amendment, and to interject the First Amendment, with its full impact, into the discussion at this point would unnecessarily confuse an already complex issue. *Johnston v. Time, Inc.*, 321 F. Supp. 837 (M.D.N.C. 1970), modified, 448 F.2d 378 (4th Cir. 1971).

Since They May Impose Vague Standards on Long-Arm Statutes. — Hazards to publishers from libel actions have been much mitigated by the development of substantive

principles under the First Amendment. It is a legitimate question whether this will not sufficiently protect communications media without superimposing a necessarily vague First Amendment standard upon the application of long-arm statutes and thereby possibly creating undue hardship for a plaintiff. *Johnston v. Time, Inc.*, 321 F. Supp. 837 (M.D.N.C. 1970), modified, 448 F.2d 378 (4th Cir. 1971).

Applied in *Schnur & Cohan, Inc. v. McDonald*, 220 F. Supp. 9 (M.D.N.C. 1963), appeal dismissed, 328 F.2d 103 (4th Cir. 1964); *Spartan Equip. Co. v. Air Placement Equip. Co.*, 263 N.C. 549, 140 S.E.2d 3 (1965); *Bowdach v. Frontierland, Inc.*, 347 F. Supp. 237 (W.D.N.C. 1972); *Marshall Exports, Inc. v. Phillips*, 385 F. Supp. 1250 (E.D.N.C.), aff'd, 507 F.2d 47 (4th Cir. 1974); *Mabry v. Fuller-Schuwayer Co.*, 50 N.C. App. 245, 273 S.E.2d 509 (1981).

Cited in *Abney Mills v. Tri-State Motor Transit Co.*, 268 N.C. 313, 150 S.E.2d 585 (1966); *Shew v. Royce Chem. Co.*, 5 N.C. App. 444, 168 S.E.2d 701 (1969); *McNamara v. Kerr-McGee Chem. Corp.*, 328 F. Supp. 1058 (E.D.N.C. 1971); *Spartan Leasing, Inc. v. Brown*, 14 N.C. App. 383, 188 S.E.2d 574 (1972); *Spartan Leasing, Inc. v. Brown*, 19 N.C. App. 295, 198 S.E.2d 583 (1973); *Spartan Leasing, Inc. v. Brown*, 285 N.C. 689, 208 S.E.2d 649 (1974); *Bryson v. Northlake Hilton*, 407 F. Supp. 73 (M.D.N.C. 1976); *Fieldcrest Mills, Inc. v. Mohasco Corp.*, 442 F. Supp. 424 (M.D.N.C. 1977).

II. MINIMUM CONTACTS.

Sufficiency of Contacts and Manner of Service Present Due Process Question. — Whether a foreign corporation has sufficient contacts within the State to subject it to service of process in an action in personam, and whether the manner of service is a reasonable method of notification to it of the action, present a question of due process which must be decided in accordance with the decisions of the Supreme Court of the United States upon the facts of each particular case upon the basis of what is fair and reasonable and just under the circumstances. *Farmer v. Ferris*, 260 N.C. 619, 133 S.E.2d 492 (1963).

Requirements of Due Process. — Due process requires only that, in order to subject a defendant to a judgment in personam if he be not present within the territory of the forum, he have certain minimum contacts with it, such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice. *Long v. Burdette Mfg. Co.*, 294 F. Supp. 784 (W.D.N.C. 1968), rev'd on other grounds, 460 F.2d 448 (4th Cir. 1972); *Epps v. Golden*, 295 F. Supp. 520 (W.D.N.C. 1968); *Goldman v. Parkland of Dallas, Inc.*, 277 N.C. 223, 176

S.E.2d 784 (1970); *Equity Assocs. v. Society for Sav.*, 31 N.C. App. 182, 228 S.E.2d 761 (1976), cert. denied, 291 N.C. 711, 232 S.E.2d 203 (1977).

Due process requires only that in order to subject a defendant to a judgment in personam, if he be not present within the territory of the forum, he have certain minimum contacts with it such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice. *Johnston v. Time, Inc.*, 321 F. Supp. 837 (M.D.N.C. 1970), modified, 448 F.2d 378 (4th Cir. 1971); *Equity Assocs. v. Society for Sav.*, 31 N.C. App. 182, 228 S.E.2d 761 (1976), cert. denied, 291 N.C. 711, 232 S.E.2d 203 (1977).

A State court may acquire in personam jurisdiction over a nonresident defendant under principles established by the United States Supreme Court where the nonresident defendant has minimum contacts with the State such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice. *Goldman v. Parkland of Dallas, Inc.*, 1 N.C. App. 400, 173 S.E.2d 15, aff'd, 277 N.C. 223, 176 S.E.2d 784 (1970).

It is sufficient for the purpose of due process if the suit is based on a contract which has substantial connection with the forum state. *Goldman v. Parkland of Dallas, Inc.*, 277 N.C. 223, 176 S.E.2d 784 (1970); *Byrum v. Register's Truck & Equip. Co.*, 32 N.C. App. 135, 231 S.E.2d 39 (1977).

It is sufficient for the purposes of due process if the suit is based on a contract which has substantial connection with the forum state. *Byham v. National Cibo House Corp.*, 265 N.C. 50, 143 S.E.2d 225 (1965); See *Equity Assocs. v. Society for Sav.*, 31 N.C. App. 182, 228 S.E.2d 761 (1976), cert. denied, 291 N.C. 711, 232 S.E.2d 203 (1977); *Gro-Mar Pub. Relations, Inc. v. Billy Jack Enterprises, Inc.*, 36 N.C. App. 673, 245 S.E.2d 782 (1978); *Telerent Leasing Corp. v. Equity Assocs.*, 36 N.C. App. 713, 245 S.E.2d 229 (1978); *Green Thumb Indus. of Monroe, Inc. v. Warren County Nursery, Inc.*, 46 N.C. App. 235, 264 S.E.2d 753 (1980); *Canterbury v. Monroe Lange Hardwood Imports*, 48 N.C. App. 90, 268 S.E.2d 868 (1980).

Due process requires that defendant have certain minimum contacts with the forum state such that maintenance of suit therein not offend "traditional notions of fair play and substantial justice." *Telerent Leasing Corp. v. Equity Assocs.*, 36 N.C. App. 713, 245 S.E.2d 229 (1978).

However minimal the burden of defending in a foreign tribunal, a defendant foreign corporation may not be called upon to do so unless he has had the "minimal contacts" with that state that are prerequisite to its exercise of power over him. *Goldman v. Parkland of*

Dallas, Inc., 277 N.C. 223, 176 S.E.2d 784 (1970).

Criteria for Subjecting Corporation to Suit Generally. — The criteria by which the boundary line is marked between those activities which justify the subjection of a corporation to suit, and those which do not, cannot be simply mechanical or quantitative. Whether due process is satisfied must depend rather upon the quality and nature of the activity in relation to the fair and orderly administration of the laws which it was the purpose of the due process clause to ensure. *Long v. Burdette Mfg. Co.*, 294 F. Supp. 784 (W.D.N.C. 1968), rev'd on other grounds, 460 F.2d 448 (4th Cir. 1972).

Essential requirements of "minimum contacts" for obtaining jurisdiction under this section are: (1) The form of substituted service adopted by the forum state must give reasonable assurance that notice to defendant will be actual; (2) there must be some act by which the defendant purposefully avails himself of the privilege of conducting activities within the forum state, invoking the benefits and protection of its law; and (3) the Legislature of the forum state must have given authority to its courts to entertain litigation against a foreign corporation to the extent permitted by the due process requirement. *Goldman v. Parkland of Dallas, Inc.*, 277 N.C. 223, 176 S.E.2d 784 (1970).

There are a number of factors, some essential and others only having weight, to be considered in determining whether the test of "minimum contacts" and "fair play" has been met. The essential requirements are: (1) The form of substituted service adopted by the forum state must give reasonable assurance that notice to defendant will be actual; (2) there must be some act by which the defendant purposefully avails himself of the privilege of conducting activities within the forum state, invoking the benefits and protection of its law; and (3) the Legislature of the forum state must have given authority to its courts to entertain litigation against a foreign corporation to the extent permitted by the due process requirement. *Byrum v. Register's Truck & Equip. Co.*, 32 N.C. App. 135, 231 S.E.2d 39 (1977).

Contact Is Crux of Jurisdictional Investigation. — While the forum state's impact upon the defendant's business is a relevant factor which cannot be overlooked, far greater weight should be given to the contact that the defendant's business has with the markets of the forum state. The latter is the crux of the jurisdictional investigation. *Johnston v. Time, Inc.*, 321 F. Supp. 837 (M.D.N.C. 1970), modified, 448 F.2d 378 (4th Cir. 1971).

Question of Minimum Contacts Is Determined by Applying Fact Situation to Law. — The question of whether there are, in fact, sufficient minimum contacts with a territorial

entity by a defendant must be determined by applying the fact situation before the court to the law as it has been set forth by the legislative and judicial authorities. *Johnston v. Time, Inc.*, 321 F. Supp. 837 (M.D.N.C. 1970), modified, 448 F.2d 378 (4th Cir. 1971).

Section 55-144 requires more "contacts" in this State than this section. *Worley's Beverages, Inc. v. Bubble Up Corp.*, 167 F. Supp. 498 (E.D.N.C. 1958); *Epps v. Golden*, 295 F. Supp. 520 (W.D.N.C. 1968).

Section 55-144 concerns foreign corporations transacting business in the State and, therefore, necessarily seems to be more restrictive in its application than this section, the latter section dealing with foreign corporations not transacting business in the State. The foreign corporation must have more contacts with the forum State in order to come within the statutory limits of § 55-144. *Long v. Burdette Mfg. Co.*, 294 F. Supp. 784 (W.D.N.C. 1968), rev'd on other grounds, 460 F.2d 448 (4th Cir. 1972); *Epps v. Golden*, 295 F. Supp. 520 (W.D.N.C. 1968).

Substantial contacts with the State are required to bring a corporation within subsection (a) of this section. *Goldman v. Parkland of Dallas, Inc.*, 7 N.C. App. 400, 173 S.E.2d 15, aff'd, 277 N.C. 223, 176 S.E.2d 784 (1970).

Minimum contacts exist if foreign company's activity is regular, or systematic, or continuous. *Staley v. Homeland, Inc.*, 368 F. Supp. 1344 (E.D.N.C. 1974).

Where Activity Continuous and Systematic, No Doubt of Presence in State. — Presence in this State has never been doubted when the activities of the corporation there have not only been continuous and systematic, but have also given rise to the liabilities sued on, even though no consent to be sued or authorization to accept service has been given. *Babson v. Clairol, Inc.*, 256 N.C. 227, 123 S.E.2d 508 (1962); *Johnston v. Time, Inc.*, 321 F. Supp. 837 (M.D.N.C. 1970), modified, 448 F.2d 378 (4th Cir. 1971).

And No Violation of Due Process. — When the activities of the foreign corporation in the forum state have not only been continuous and systematic, but also give rise to the liabilities sued on, the forum state does not violate due process by taking jurisdiction of the suit instituted by a resident of such state, even though no consent to be sued or authorization to an agent to accept service of process has been given. *Byham v. National Cibo House Corp.*, 265 N.C. 50, 143 S.E.2d 225 (1965).

Continuing Business with Substantial Contacts Affords Jurisdiction. — Where the defendant's business was a continuing one and a substantial portion of the plaintiff's alleged cause of action arose out of substantial contacts within the State, the minimum contacts necessary to the jurisdiction of this State's courts

exist. *Crabtree v. Coats & Burchard Co.*, 7 N.C. App. 624, 173 S.E.2d 473 (1970).

Substantial Contacts Make Exercise of Jurisdiction Just. — Direct, substantial and uninterrupted contacts by a foreign corporation with this State make it reasonable and just for the court to exercise its jurisdiction over such foreign corporation as authorized by this section. *Farmer v. Ferris*, 260 N.C. 619, 133 S.E.2d 492 (1963).

Reducing Physical Contacts to Minimum Does Not Bar Suit. — Clearly it would not comport with notions of fair play and substantial justice to allow a business enterprise, whose overriding business purpose is maximum exploitation of the national market, to be free from suit as a matter of law in all states but that of publication simply because physical contacts with the other states had been reduced to a minimum. *Johnston v. Time, Inc.*, 321 F. Supp. 837 (M.D.N.C. 1970), modified, 448 F.2d 378 (4th Cir. 1971).

Activity Held Not to Establish Minimum Contacts. — Where a real estate corporation never had an office or agent in this State, it has never advertised or solicited business here, and the cause of action did not result from a sale by the corporation to someone then in this State, nor could the corporation expect to benefit from or use the laws of this State to enforce any obligations, this would not establish the minimum contacts required to ensure due process. *Staley v. Homeland, Inc.*, 368 F. Supp. 1344 (E.D.N.C. 1974).

Occasional visits by an out-of-state car dealer to the regional office of the manufacturer in this State, for the purpose of viewing new model automobiles, or taking customers who wished to purchase some particular type of automobile or truck which the defendant did not have at its place of business, and occasional communications with said regional office by telephone, telegram, or letter, fall far short of the "minimum contacts" required to subject a foreign corporation to jurisdiction of the courts of this State. *Easterling v. Cooper Motors, Inc.*, 26 F.R.D. 1 (M.D.N.C. 1960).

III. CONTRACTS MADE OR PERFORMED IN STATE.

Constitutionality of Subdivision (1) of Subsection (a). — A number of states have statutes similar to subdivision (1) of subsection (a). These statutes generally provide that where the cause of action arises out of a contract with a foreign corporation, made in the forum state or to be performed in whole or in part in such state, an action in personam may be maintained in the forum state, upon substituted service of process. In no instance has such statute been declared unconstitutional. *Goldman v. Parkland of Dallas, Inc.*, 7 N.C. App. 400, 173 S.E.2d 15, aff'd, 277 N.C. 223, 176 S.E.2d 784 (1970).

The applicability of subdivision (1) of subsection (a) is consistent with the federal requirements of due process. *Crabtree v. Coats & Burchard Co.*, 7 N.C. App. 624, 173 S.E.2d 473 (1970).

Legislature Intended to Grant Fulllest Jurisdiction over Contracts Made Here. — The Legislature, by the express words of this section authorizing service on a foreign corporation when the contract was made in this State, sought to give to its courts the power to assert jurisdiction over nonresident defendants to the full extent permitted by the due process requirement. *Goldman v. Parkland of Dallas, Inc.*, 277 N.C. 223, 176 S.E.2d 784 (1970).

In Personam Jurisdiction under Subdivision (1) of Subsection (a). — The assumption of in personam jurisdiction by a North Carolina court, pursuant to subdivision (1) of subsection (a), does not offend the due process clause of the Constitution of the United States if the defendant has sufficient "minimum contacts" with the State. *Goldman v. Parkland of Dallas, Inc.*, 277 N.C. 223, 176 S.E.2d 784 (1970).

Limited to Situations Where Foreign Defendant Is Party to Contract. — The operation of subdivision (1) of subsection (a) is limited to situations where the foreign defendant against whom a cause of action is asserted is a party to the contract forming the basis of jurisdiction. *Koppers Co. v. Kaiser Aluminum & Chem. Corp.*, 9 N.C. App. 118, 175 S.E.2d 761 (1970).

Contract Made or to Be Performed in State Is Sufficiently Substantial Contact. — Subdivision (1) of subsection (a) confers jurisdiction upon this State's courts when the contract is made or to be performed in North Carolina; therefore, where it is found that the contract was made in North Carolina or was to be performed in North Carolina, a sufficiently substantial contact to confer jurisdiction on the North Carolina courts has been established. *Goldman v. Parkland of Dallas, Inc.*, 7 N.C. App. 400, 173 S.E.2d 15, aff'd, 277 N.C. 223, 176 S.E.2d 784 (1970).

While the mere execution of a contract in this State has never been held to be a substantial connection, the execution, anticipated performance and continuing part performance of the contract in this State constitute substantial in-state activity; thus, North Carolina's courts have in personam jurisdiction over the assignee of the contract. *Munchak Corp. v. Caldwell*, 25 N.C. App. 652, 214 S.E.2d 194, cert. denied, 287 N.C. 664, 216 S.E.2d 907 (1975).

Single Contract Is Sufficient. — A single contract, where it is made or to be performed in this State, is sufficient to subject the nonresident corporation to suit in this State under subdivision (1) of subsection (a). *Goldman v. Parkland of Dallas, Inc.*, 7 N.C.

App. 400, 173 S.E.2d 15, aff'd, 277 N.C. 223, 176 S.E.2d 784 (1970); *Telerent Leasing Corp. v. Equity Assocs.*, 36 N.C. App. 713, 245 S.E.2d 229 (1978).

While the mere act of entering into a contract with a North Carolina resident does not constitute the necessary minimum contacts for the exercise of jurisdiction over a nonresident, a single contract which was made or was to be performed in this State is sufficient to subject a nonresident corporation to suit under subdivision (a)(1) of this section. *General Time Corp. v. Eye Encounter, Inc.*, 50 N.C. App. 467, 274 S.E.2d 391 (1981).

If a contract is to be actually performed in this State and has a substantial connection with this State, jurisdiction will lie. *Staley v. Homeland, Inc.*, 368 F. Supp. 1344 (E.D.N.C. 1974).

Single Contract Not Involving Contract Performed Here. — If there is only one contact with this State and such contact does not involve a contract to be performed here, there is no jurisdiction. *Staley v. Homeland, Inc.*, 368 F. Supp. 1344 (E.D.N.C. 1974).

Contract Made in this State if Final Act Done Here. — A contract made in this State is one which is executed in this State, i.e., where the final act necessary to make it a binding obligation was done in this State. *Bowman v. Curt G. Joa, Inc.*, 361 F.2d 706 (4th Cir. 1966).

For a contract to be made in this State, it must be executed in North Carolina, that is, the final act necessary to make it a binding obligation must be done in the forum state. *Goldman v. Parkland of Dallas, Inc.*, 7 N.C. App. 400, 173 S.E.2d 15, aff'd, 277 N.C. 223, 176 S.E.2d 784 (1970); *Telerent Leasing Corp. v. Equity Assocs.*, 36 N.C. App. 713, 245 S.E.2d 229 (1978); *Chemical Realty Corp. v. Home Fed. Sav. & Loan Ass'n*, 40 N.C. App. 675, 253 S.E.2d 621 (1979), appeal dismissed, 297 N.C. 612, 257 S.E.2d 435 (1979), 444 U.S. 1061, 100 S. Ct. 1000, 62 L. Ed. 2d 744 (1980).

But Is Made Elsewhere When Final Act Is Done Out of State. — Where the final act of executing a sales contract was the signature by the seller in another state the contract was thus to be considered made in another state. *Bowman v. Curt G. Joa, Inc.*, 361 F.2d 706 (4th Cir. 1966).

Performance in State Authorizes Service of Process. — Service of process upon a foreign corporation is proper under the terms of this section if the contract is to be performed in this State. *Goldman v. Parkland of Dallas, Inc.*, 277 N.C. 223, 176 S.E.2d 784 (1970).

Applicable Only to Contracts to Be Performed Here to Substantial Degree. — States which have sought to bring within the jurisdiction of their courts foreign corporations which contract with residents of the State, whether the whole or any part of the contract is

to be performed in the forum state, have drafted their "long arm" statutes to read "to be performed in whole or in part" in the State. North Carolina has not chosen to use this broader language in its statute, and so subdivision (1) of subsection (a) of this section must be construed as relating only to those contracts that are to be performed to a substantial degree within the forum state. *Bowman v. Curt G. Joa, Inc.*, 361 F.2d 706 (4th Cir. 1966).

Performance outside this State. — Where the contract between plaintiff and defendant was performed outside this State, the provision of subdivision (1) of subsection (a) cannot be invoked to support service of process on the Secretary of State. *Canterbury v. Monroe Lange Hardwood Imports*, 48 N.C. App. 90, 268 S.E.2d 868 (1980).

Contract Executed and Performed in State and Accepted outside State. — Where a contract is executed by plaintiff in this State, accepted by defendant in another state, and is to be performed in this State, subdivision (1) of subsection (a) is satisfied and the assumption of jurisdiction does not offend the due process clause of the Constitution of the United States. *Marshville Rendering Corp. v. Gas Heat Eng'r Corp.*, 10 N.C. App. 39, 177 S.E.2d 907 (1970).

Absent Obligation to Plaintiff, There Is No Jurisdiction. — Where, under the terms of a contract, the defendant incurred no obligation to plaintiff and had no duties to perform, that contract affords no basis for jurisdiction. *Koppers Co. v. Kaiser Aluminum & Chem. Corp.*, 9 N.C. App. 118, 175 S.E.2d 761 (1970).

Issue Limited to Performance in State, Absent Evidence It Was Made in State. — Where there was no evidence presented and no finding made that any contract forming the basis of the litigation was made in North Carolina, the inquiry is limited to the issue of "performance within this State." *Koppers Co. v. Kaiser Aluminum & Chem. Corp.*, 9 N.C. App. 118, 175 S.E.2d 761 (1970).

Contract Held Made and Performed in State. — Where the contract between defendant and plaintiff was both made and substantially performed in this State, because plaintiff performed the final act necessary to make it a binding agreement by signing it in this State and the contract was substantially performed here because the motel was built here, if subsection (a)(1) is given its plain and ordinary meaning, it encompasses the cause of action. *Equity Assocs. v. Society for Sav.*, 31 N.C. App. 182, 228 S.E.2d 761 (1976), cert. denied, 291 N.C. 711, 232 S.E.2d 203 (1977).

Contract Held Performed in State. — Where the sole performance called for under the contract was the payment of funds by the foreign defendant bank to a foreign contractor's creditors and all of the creditors were located in North Carolina; they were to be paid in North

Carolina; and the debts arose out of work performed in North Carolina, the cause of action alleged by plaintiff arises out of a contract to be performed in this State within the meaning of subsection (a)(1). *Koppers Co. v. Kaiser Aluminum & Chem. Corp.*, 9 N.C. App. 118, 175 S.E.2d 761 (1970).

Contract Held Not Performed in State. — Where almost the entire performance of the contract was to occur at the seller's manufacturing plant in another state, the buyers to accept delivery there and pay all shipping costs to their North Carolina business site and the seller was to provide one technician for one day at the buyers' plant to advise appellants on how they were to install the machine and after the buyers had completed the installation, seller's technician was to return to North Carolina and inspect the installation and supervise the initial production run on the machine, the substantial portion of the overall contract performance therefore occurred at appellee's manufacturing plant in the other state, and subdivision (1) of subsection (a) did not apply. *Bowman v. Curt G. Joa, Inc.*, 361 F.2d 706 (4th Cir. 1966).

IV. SOLICITATION OF BUSINESS IN STATE.

Contract Evidenced by Telegraph and Mail Communication. — In an action by plaintiff to recover the balance of payments allegedly due it by defendant, a California corporation, for goods shipped from plaintiff's manufacturing plant in this State, the trial court did not err in denying defendant's motion to dismiss for lack of in personam jurisdiction where the evidence tended to show that all communication concerning the transaction was conducted by telegraph and by mail and that both parties considered themselves to have executed a contract since such evidence was sufficient to show that a contract was made in this State so that defendant had sufficient contacts with North Carolina to subject it to suit here. *General Time Corp. v. Eye Encounter, Inc.*, 50 N.C. App. 467, 274 S.E.2d 391 (1981).

V. GOODS EXPECTED TO BE USED OR CONSUMED IN STATE.

Constitutionality of Subdivision (3) of Subsection (a) Involves Due Process Question. — The constitutionality of subdivision (3) of subsection (a) involves a question of due process of law, to be determined in accordance with the decisions of the Supreme Court of the United States, and in this connection *International Shoe Co. v. Washington*, 326 U.S. 310, 66 S. Ct. 154, 90 L.Ed. 95, 161 A.L.R. 1057 (1945) is decisive. *Shepard v. Rheem Mfg. Co.*, 249 N.C. 454, 106 S.E.2d 704 (1959), distinguishing *Putnam v. Triangle Publications, Inc.*, 245 N.C. 432, 96 S.E.2d 445 (1957) and *Erlanger Mills*,

Inc. v. Cohoes Fibre Mills, Inc., 239 F.2d 502 (4th Cir. 1956) on the facts.

Subdivision (3) of Subsection (a) Is Not Violative of Any Provision of the North Carolina Constitution. Shepard v. Rheem Mfg. Co., 249 N.C. 454, 106 S.E.2d 704 (1959), distinguishing Putnam v. Triangle Publications, Inc., 245 N.C. 432, 96 S.E.2d 445 (1957) and Erlanger Mills, Inc. v. Cohoes Fibre Mills, Inc., 239 F.2d 502 (4th Cir. 1956) on the facts.

Mere Fact of Manufacture Insufficient for Service of Process. — The mere fact that a foreign corporation was the manufacturer of an implement which caused injury to a resident of this State because of alleged defect or absence of safety device, is alone an insufficient predicate for service of process upon such corporation under subsection (a), subdivisions (3) and (4), the implement having been purchased by a resident of this State from an independent contractor and distributor of another state. Moss v. City of Winston-Salem, 254 N.C. 480, 119 S.E.2d 445 (1961).

Lack of Expectation That Product Will Be Used or Consumed in State. — If a foreign corporation has never had any interest in this State or contacts here, even if it can reasonably be expected that its product will be used or consumed here, to grant jurisdiction for that reason would be unconstitutional. Staley v. Homeland, Inc., 368 F. Supp. 1344 (E.D.N.C. 1974).

Liability for Defective Goods Sold to Wholesaler in State. — A foreign corporation selling home appliances to wholesalers in North Carolina is subject to service of process under subsection (a)(3) of this section in an action by a resident of this State to recover for personal injury allegedly resulting from a defective appliance manufactured by the foreign corporation, notwithstanding that title to appliances sold by the corporation in this State passes to the wholesalers at the point of shipment outside of this State and notwithstanding that the foreign corporation maintains no agents or employees here except agents for the solicitation of orders which are subject to approval by the home office, and such service subjects the foreign corporation to a judgment in personam. Shepard v. Rheem Mfg. Co., 249 N.C. 454, 106 S.E.2d 704 (1959).

Subdivision (3) of Subsection (a) Is Inapplicable Where Machine Sold Never Enters State. — Subsection (a)(3) of this section was not applicable to an action for breach of a sales contract by a seller in another state, where the machine sold to buyers in this State under the contract had never entered this State nor been used there. Bowman v. Curt G. Joa, Inc., 361 F.2d 706 (4th Cir. 1966).

Contacts Held Sufficient for Jurisdiction. — Where defendant had agents residing in and

working in this State and shipped large quantities of its appliances into this State with the reasonable expectation that they would be used in the homes of the people of this State and its sales contracts were accepted outside this State, the cause of action arises out of activities described in subdivision (3) of subsection (a). The minimum contacts requirement was satisfied so that the due process clause was not offended by this subsection. Marshville Rendering Corp. v. Gas Heat Eng'r Corp., 10 N.C. App. 39, 177 S.E.2d 907 (1970).

Contacts Held Insufficient for Jurisdiction. — Where the parties were both commercial concerns dealing on equal footing at arm's length, and the defendant had never solicited, advertised, or transacted business in this State, and its only contact with this State was the contract in suit, which was made and substantially performed in another state, it was held that to subject the defendant to the in personam jurisdiction of the courts in this State under subdivision (3) of subsection (a) would violate due process. Golden Belt Mfg. Co. v. Janler Plastic Mold Corp., 281 F. Supp. 368 (M.D.N.C. 1967), aff'd, 391 F.2d 266 (4th Cir. 1968).

Subdivision (3) of subsection (a) was invalid insofar as it attempted to subject a New York corporation to the jurisdiction of this State for a single sale of goods consummated in New York with the reasonable expectation that those goods are to be used in this State and are so used and consumed. Erlanger Mills, Inc. v. Cohoes Fibre Mills, Inc., 239 F.2d 502 (4th Cir. 1956).

Subdivision (3) of subsection (a) was unconstitutional as applied to an action for libel against a foreign publishing corporation which delivered magazines to a common carrier for shipment to a wholesale dealer in this State for resale by the dealer, and which employed sales promotion representatives who made only occasional visits in this State, since such corporation had no contacts, ties or relations within this State so as to make it amenable to service of process here for the purpose of a judgment in personam. Putnam v. Triangle Publications, Inc., 245 N.C. 432, 96 S.E.2d 445 (1957).

VI. TORTS.

When Jurisdiction Violates Due Process. — To sustain jurisdiction in this State, even if the tort was committed in North Carolina, while the only acts of negligence on the part of the defendant are alleged to have been committed in another state, would be offensive to the due process clause of the U.S. Constitution. Easterling v. Cooper Motors, Inc., 26 F.R.D. 1 (M.D.N.C. 1960).

Necessary Showing under Subdivision (4) of Subsection (a). — When seeking to acquire personal jurisdiction under subdivision (4) of subsection (a), a plaintiff must show that:

(1) The cause of action arose in North Carolina; and (2) the defendant committed one or more acts which gave rise to the cause of action in this State. *Munchak Corp. v. Riko Enterprises, Inc.*, 368 F. Supp. 1366 (M.D.N.C. 1973).

Tortious Act Alone Is Sufficient for Jurisdiction. — The mere fact that a tortious act was committed within the State by the defendant was sufficient under the statute to render the defendant amenable to the jurisdiction of the North Carolina courts, and a finding that the defendant was "doing business" within the State was mere surplusage and not necessary for the purposes of the determination. *Johnston v. Time, Inc.*, 321 F. Supp. 837 (M.D.N.C. 1970), modified, 448 F.2d 378 (4th Cir. 1971).

The commission of a single tort is sufficient under this section to grant jurisdiction. *Johnston v. Time, Inc.*, 321 F. Supp. 837 (M.D.N.C. 1970), modified, 448 F.2d 378 (4th Cir. 1971).

Where the allegations of the complaint and the crucial findings of fact made by the court below disclose that the plaintiff's cause of action arose out of a defendant's tortious conduct committed in this State, this suffices under this section to render a foreign corporation amenable to the jurisdiction of this State. *Marshville Rendering Corp. v. Gas Heat Eng'r Corp.*, 10 N.C. App. 39, 177 S.E.2d 907 (1970).

But Defendant Must Have Committed Some Act in State. — The language with respect to "repeated activity or single acts" indicates that the defendant must have committed some act in this State, whether it be one of misfeasance or nonfeasance. *Munchak Corp. v. Riko Enterprises, Inc.*, 368 F. Supp. 1366 (M.D.N.C. 1973).

No case has been found which has established North Carolina as the situs of the cause of action without some act by the defendant which gave rise to the tort having occurred in this State. *Munchak Corp. v. Riko Enterprises, Inc.*, 368 F. Supp. 1366 (M.D.N.C. 1973).

Place of a wrong is in the state where there takes place the last event which is necessary to render the actor liable for an alleged tort. *Munchak Corp. v. Riko Enterprises, Inc.*, 368 F. Supp. 1366 (E.D.N.C. 1973).

Where last event necessary to render actor liable occurred in this State, the cause of action is one arising in this State, and subsection (a) is applicable. *Marshville Rendering*

Corp. v. Gas Heat Eng'r Corp., 10 N.C. App. 39, 177 S.E.2d 907 (1970).

Defendant's Conduct, Not Result, Is Focus of Section. — It is the defendant's conduct which is the focus of the language in subdivision (4) of subsection (a), not the result of that conduct. *Munchak Corp. v. Riko Enterprises, Inc.*, 368 F. Supp. 1366 (M.D.N.C. 1973).

Occurrence of Damages Is Not an Activity or Act within Section. — Even assuming as correct the contention that the occurrence of harm constitutes the last event of tortious conduct where actual damage is an essential element of a tort so as to establish the situs of the tort, the occurrence of damages cannot be construed to be an activity or act by the defendant as set forth in subdivision (4) of subsection (a). *Munchak Corp. v. Riko Enterprises, Inc.*, 368 F. Supp. 1366 (M.D.N.C. 1973).

Breach of Sales Contract Not within Subdivision (4) of Subsection (a). — In an action for breach of a sales contract, where the buyers sought to bring their action within subdivision (4) of subsection (a) of this section by alleging that the seller never intended to perform the contract, but planned to deceive the buyers and cause them to act to their detriment, the plea was insufficient to bring the action within subdivision (4) of subsection (a), since the theme of the action was contract and not tort. *Bowman v. Curt G. Joa, Inc.*, 361 F.2d 706 (4th Cir. 1966).

Publication of Libel by Reading Magazine. — Assuming that a magazine article was libelous, there would have been a publication of the libel each time it was read in this State, and therefore a tortious act would have been committed in this State, which would be sufficient to grant the North Carolina courts jurisdiction by virtue of subsection (a)(4). *Johnston v. Time, Inc.*, 321 F. Supp. 837 (M.D.N.C. 1970), modified, 448 F.2d 378 (4th Cir. 1971).

Tortious Acts Held Sufficient to Support Substituted Service. — In an action against a nonresident corporation for wrongfully taking plaintiff's property by duress and threats of arrest without legal process and for invasion of privacy and public humiliation findings of fact that the tortious acts were committed in this State were sufficient to support adjudication that service of process on it by service on the Secretary of State was valid. *Painter v. Home Fin. Co.*, 245 N.C. 576, 96 S.E.2d 731 (1957).

§ 55-146. Service on foreign corporations by service on Secretary of State.

(a) Service on the Secretary of State, when he is agent of a foreign corporation as provided in this Chapter, of any process, notice or demand shall be made by the sheriff delivering to and leaving with the Secretary of State duplicate copies of such process, notice or demand. Service of process on the foreign

corporation shall be deemed complete when the Secretary of State is so served. The Secretary of State shall endorse upon both copies the time of receipt and shall forthwith send one of such copies by registered or certified mail with return receipt requested addressed to such corporation at its principal office as it appears in the records of the Secretary of State or, if there is no address of the corporation on file with the Secretary of State, then to said corporation at its office as shown in the official registry of the state of its incorporation. The Secretary of State may require the plaintiff or his attorney to furnish such address. A copy of the complaint or order of the clerk extending the time for filing the complaint must be mailed to the corporation with the copy of the summons. When a copy of the complaint is not mailed with the summons, the Secretary of State shall mail a copy of the complaint when it is served on him in the same manner as the copy of summons is required to be mailed.

(b) Upon the return to the Secretary of State of the requested return receipt showing delivery and acceptance of such registered or certified mail, or upon the return of such registered or certified mail showing refusal thereof by such foreign corporation, the Secretary of State shall note thereon the date of such return to him and shall attach either the return receipt or such refused mail including the envelope, as the case may be, to the copy of the process, notice or demand theretofore retained by him and shall mail the same to the clerk of the court in which such action or proceeding is pending and in respect of which such process, notice or demand was issued. Such mailing, in addition to the return by the sheriff, shall constitute the due return required by law. The clerk of the court shall thereupon file the same as a paper in such action or proceeding.

(c) Service made under this section shall have the same legal force and validity as if the service had been made personally in this State. The refusal of any such foreign corporation to accept delivery of the registered or certified mail provided for in subsection (a) of this section or the refusal to sign the return receipt shall not affect the validity of such service; and any foreign corporation refusing to accept delivery of such registered or certified mail shall be charged with knowledge of the contents of any process, notice or demand contained therein.

(d) Whenever service of process is made upon the Secretary of State as herein provided the defendant foreign corporation shall have 30 days from the date when the defendant receives or refuses to accept the registered or certified mail containing the copy of the complaint sent as in this section provided in which to appear and answer the complaint in the action or proceeding so instituted. Entries on the defendant's return receipt or the refused registered or certified mail shall be sufficient evidence of such date. If the date of acceptance or refusal to accept the registered or certified mail cannot be determined from the entries on the return receipt or from notations of the postal authorities on the envelope, then the date when the defendant accepted or refused to accept the registered or certified mail shall be deemed to be the date that the return receipt or the registered or certified mail was received back by the Secretary of State.

(e) The court in which the action is pending shall order such additional time as may be necessary to afford the defendant reasonable opportunity to answer the complaint and defend the action.

(f) The Secretary of State shall keep a summarized record of all processes, notices, and demands served upon him under this section, and shall record therein the time of such service and his action with reference thereto.

(g) Nothing herein contained shall limit or affect the right to serve any process, notice or demand to be served upon a corporation in any other manner now or hereafter permitted by law. (1901, c. 5; Rev., s. 1243; C.S., s. 1137; G.S., s. 55-38; 1955, c. 1143; c. 1371, s. 1; 1977, 2nd Sess., c. 1219, s. 34.)

Legal Periodicals. — For article on modern statutory approaches to service of process

outside the State, see 49 N.C.L. Rev. 235 (1971).

CASE NOTES

This section and § 55-144 apply exclusively to foreign corporations. Whether analogous statutes, applicable to nonresident unincorporated associations, should be enacted, is for legislative determination. *Melton v. Hill*, 251 N.C. 134, 110 S.E.2d 875 (1959).

Form of substituted service adopted by this State gives reasonable assurance that a defendant would be given actual notice. *Goldman v. Parkland of Dallas, Inc.*, 277 N.C. 223, 176 S.E.2d 784 (1970).

Actual Notice Not Required. — Actual notice to defendant was not required by either this section or by constitutional guarantees of due process; the substituted service upon the Secretary of State was sufficient to confer in personam jurisdiction over defendant. *Royal Bus. Funds Corp. v. South E. Dev. Corp.*, 32 N.C. App. 362, 232 S.E.2d 215, cert. denied, 292 N.C. 728, 235 S.E.2d 784 (1977).

Service on the Secretary of State is sufficient to bring into court a foreign corporation if it does not have a process agent and is doing business in this State. *Babson v. Clairol, Inc.*, 256 N.C. 227, 123 S.E.2d 508 (1962); *Spartan Equip. Co. v. Air Placement Equip. Co.*, 263 N.C. 549, 140 S.E.2d 3 (1965).

If the defendant does not contend that it has a process agent in North Carolina, service on the Secretary of State is sufficient to bring the defendant into court. *Crabtree v. Coats & Burchard Co.*, 7 N.C. App. 624, 173 S.E.2d 473 (1970).

When Service Complete. — While this section provides the procedures which the Secretary of State must follow once he has been served, there is nothing in its language to indicate that the registered mail must be either accepted or rejected in order for service to be complete. Such an interpretation would be contrary to the clear legislative intent as expressed in subsection (a) that service is complete when the Secretary of State is served. *Royal Bus.*

Funds Corp. v. South E. Dev. Corp., 32 N.C. App. 362, 232 S.E.2d 215, cert. denied, 292 N.C. 728, 235 S.E.2d 784 (1977).

Effect of Stipulation of Compliance With § 55-146. — Where the parties stipulated that "the mechanics of service and return set forth in subsections (a) and (b) of § 55-146 were in all respects complied with," it was conceded that this section gives reasonable assurance that the notice to defendant will be actual, and in this case was actual. *Byham v. National Cibo House Corp.*, 265 N.C. 50, 143 S.E.2d 225 (1965).

Service Authorizes In Personam Judgment. — Where a cause of action stated in a complaint arises out of a transaction which falls within the terms of § 55-145 and service of process is had under this section, the defendant is brought within the jurisdiction of the court for purposes of an in personam judgment. *Farmer v. Ferris*, 260 N.C. 619, 133 S.E.2d 492 (1963).

Applied in *United States v. Tug Parris Island*, 215 F. Supp. 149 (E.D.N.C. 1963); *Throwing Corp. of Am. v. Deering Milliken Research Corp.*, 302 F. Supp. 487 (M.D.N.C. 1969).

Cited in *Dow Chem. Co. v. Melton Corp.*, 281 F.2d 292 (4th Cir. 1960); *Moss v. City of Winston-Salem*, 254 N.C. 480, 119 S.E.2d 445 (1961); *Abney Mills v. Tri-State Motor Transit Co.*, 265 N.C. 61, 143 S.E.2d 235 (1965); *Bowman v. Curt G. Joa, Inc.*, 361 F.2d 706 (4th Cir. 1966); *Epps v. Golden*, 295 F. Supp. 520 (W.D.N.C. 1968); *Koppers Co. v. Kaiser Aluminum & Chem. Corp.*, 9 N.C. App. 118, 175 S.E.2d 761 (1970); *Marshallville Rendering Corp. v. Gas Heat Eng'r Corp.*, 10 N.C. App. 39, 177 S.E.2d 907 (1970); *Johnston v. Time, Inc.*, 321 F. Supp. 837 (M.D.N.C. 1970); *Marshall Exports, Inc. v. Phillips*, 507 F.2d 47 (4th Cir. 1974); *Gro-Mar Pub. Relations, Inc. v. Billy Jack Enterprises, Inc.*, 36 N.C. App. 673, 245 S.E.2d 782 (1978).

§ 55-146.1. Alternative jurisdiction over and service of process on foreign corporations.

In addition to the provisions set out in this Chapter, foreign corporations may be served with process and subjected to the jurisdiction of the courts of this State pursuant to applicable provisions of Chapter 1 and Chapter 1A of the General Statutes. (1967, c. 954, s. 3; 1973, c. 469, s. 44.)

Editor's Note. — The Rules of Civil Procedure (§ 1A-1) and the jurisdiction statute (§ 1-75.1 et seq.) which accompanies them seek

to secure for the courts of North Carolina the full extent of jurisdiction constitutionally allowable to them, and accordingly there is

duplication of some of the "long arm" statutes already in force in this State with regard to corporations and insurers. It is the purpose of this section and §§ 55A-68.1 and 58-153.2 to allow service of process and the obtaining of jurisdiction under either procedure.

Legal Periodicals. — For article entitled, "Foreign Corporations in North Carolina: The 'Doing Business' Standards of Qualification, Taxation, and Jurisdiction," see 16 Wake Forest L. Rev. 711 (1980).

§ 55-147. Amendment to charter of foreign corporation.

Whenever the charter of a foreign corporation authorized to transact business in this State is amended, such foreign corporation shall, within 30 days after such amendment becomes effective, file in the office of the Secretary of State a copy of such amendment duly authenticated by the proper officer of the state or country under the laws of which it is incorporated; but the filing thereof shall not of itself amend its certificate of authority. (1955, c. 1371, s. 1.)

§ 55-148. Merger of foreign corporation authorized to transact business in this State.

Whenever a foreign corporation authorized to transact business in this State shall be a party to a statutory merger permitted by the laws of the state or country under which it is incorporated, and such corporation shall be the surviving corporation, it shall, within 30 days after such merger becomes effective, file with the Secretary of State a copy of the articles of merger duly authenticated by the proper officer of the state or country under the laws of which such statutory merger was effected. It shall not be necessary for such corporation to procure either a new or amended certificate of authority to transact business in this State unless the name of such corporation be changed thereby or unless the corporation desires to pursue in this State other or additional purposes than those which it is then authorized to pursue in this State. (1955, c. 1371, s. 1.)

CASE NOTES

Cited in *East Carolina Lumber Co. v. West*,
247 N.C. 699, 102 S.E.2d 248 (1958).

§ 55-149. Amended certificate of authority.

(a) A foreign corporation authorized to transact business in this State shall procure an amended certificate of authority in the event it changes its corporate name, or desires to pursue in this State other or additional purposes than those set forth in its prior application for a certificate of authority, by making application therefor to the Secretary of State.

(b) The requirements in respect to the form, the manner of its execution, the filing of the application and the conformed copy thereof with the Secretary of State, the issuance of an amended certificate of authority and the effect thereof, shall be the same as in the case of an original application for a certificate of authority. The contents of such application need not be the same as in the case of an original application for a certificate of authority provided the application sets forth information as to the changes proposed. (1955, c. 1371, s. 1.)

§ 55-150. Withdrawal of foreign corporation.

(a) A foreign corporation authorized to transact business in this State may withdraw from this State upon procuring from the Secretary of State a certificate of withdrawal.

(b) In order to procure such certificate of withdrawal, such foreign corporation shall deliver to the Secretary of State an application for withdrawal, together with a conformed copy thereof, which shall set forth:

- (1) The name and post-office address of the principal office of the corporation and the state or country under the laws of which it is incorporated.
- (2) That the corporation is not transacting business in this State.
- (3) That the corporation surrenders its authority to transact business in this State.
- (4) That the corporation either continues its registered agent in this State or revokes his authority to accept service of process and consents that service of process in any action or proceeding based upon any cause of action arising in this State, or arising out of business transacted in this State, during the time the corporation was authorized to transact business in this State may thereafter be made on such corporation by service thereof on the Secretary of State.
- (5) If required by the Secretary of Revenue, such additional information as may be necessary or appropriate in order to determine and assess any unpaid taxes and fees payable under the laws of this State.

(c) The application for withdrawal shall be executed by the corporation by its president or a vice-president and by its secretary or an assistant secretary, and verified by one of its officers signing such application, or, if the corporation is in the hands of a receiver or trustee, shall be executed on behalf of the corporation by such receiver or trustee and verified by him.

(d) If the Secretary of State finds that such application conforms to law, he shall, when notified by the Secretary of Revenue that such corporation has met the requirements with respect to reports and taxes required by the revenue laws of this State:

- (1) Endorse on each of such documents the word "filed," and the hour, day, month and year of the filing thereof.
- (2) File the application in his office.
- (3) Issue a certificate of withdrawal to which he shall affix the conformed copy.

(e) The certificate of withdrawal, together with the conformed copy of the application for withdrawal affixed thereto by the Secretary of State, shall be returned to the corporation or its representative. Upon the issuance of such certificate of withdrawal, the authority of the corporation to transact business in this State shall cease. (1955, c. 1371, s. 1; 1973, c. 476, s. 193.)

§ 55-151. Revocation of certificate of authority.

(a) The certificate of authority of a foreign corporation to transact business in this State may be revoked by the Secretary of State upon the conditions prescribed in this section when:

- (1) The corporation has failed for a period of 30 days to establish and maintain a registered office as required by G.S. 55-141; or
- (2) The corporation has failed for a period of 30 days to appoint and maintain a registered agent in this State as required by G.S. 55-141; or
- (3) The corporation has failed for a period of 30 days after change of its registered office or registered agent to file in the office of the Secretary of State a statement of such change pursuant to G.S. 55-142; or

- (4) The corporation has failed to file in the office of the Secretary of State any amendment to its charter or any articles of merger within the time prescribed by G.S. 55-147 and 55-148; or
- (5) A willful misrepresentation has been made of any material matter in any application, report, affidavit, or other document submitted by such corporation pursuant to this Chapter; or
- (6) The corporation has, without justification, refused to comply with a court order made pursuant to G.S. 55-38; or
- (7) The corporation is exceeding the authority conferred upon it by this Chapter.

(b) On the happening of any of the events set out in subsection (a) of this section, the Secretary of State shall give not less than 20 days' written notice to the corporation that he intends to revoke the certificate of authority of such corporation for one of the said causes, specifying the same. Such notice shall be given by mail duly addressed to the corporation at its registered office in this State and at its principal office outside the State, as shown by the records in the office of the Secretary of State. If, before the expiration of the time stated in the notice, the corporation establishes to the satisfaction of the Secretary of State the fact that the stated cause for the revocation of its certificate of authority did not exist as of the time the notice was mailed or, if it did exist at said time, has been cured, then the Secretary of State shall take no further action. Otherwise, on the expiration of the time stated in the notice, he shall revoke the certificate of authority.

(c) Nothing herein shall be deemed to repeal or modify any provision of the Revenue Act relating to the suspension of the certificate of authority of foreign corporations for failure to comply with the provisions thereof. (1955, c. 1371, s. 1.)

§ 55-152. Issuance of certificate of revocation.

(a) To revoke any such certificate of authority, the Secretary of State shall:

- (1) Issue a certificate of revocation in triplicate.
- (2) File one of such certificates in his office.
- (3) Mail one of such certificates to such corporation at its registered office in this State and one to the corporation at its principal office in the state or country under the laws of which it is incorporated, as shown by the records in the office of the Secretary of State.

(b) Upon the issuance of such certificate of revocation, the authority of the corporation to transact business in this State shall cease. (1955, c. 1371, s. 1.)

§ 55-153. Application of this Chapter to foreign corporations heretofore domesticated in this State.

(a) Subject to the provisions of subsection (d) of this section, foreign corporations which have been duly domesticated in this State at the time this Chapter takes effect shall be entitled to all the rights and privileges applicable to foreign corporations procuring authority to transact business in this State under this Chapter, and from the time this Chapter takes effect such corporations shall be subject to all the limitations, restrictions, liabilities, and duties prescribed herein for foreign corporations procuring under this Chapter authority to transact business in this State.

(b) Foreign corporations heretofore domesticated in this State which have not designated a principal office are required on and after July 1, 1957 to designate a registered office and appoint a registered agent in the manner, as near as may be, provided in G.S. 55-142.

(c) If any foreign corporation has, prior to the effective date of this Chapter, filed with the Secretary of State a statement designating a principal office

within this State and agent in charge thereof and has continued to maintain the same, it shall not be required to, but it may, designate a new registered office and agent in the manner, as near as may be, provided in G.S. 55-142.

(d) If there is no office and agent registered in the office of the Secretary of State, then service of process may be made on the Secretary of State, as provided in G.S. 55-146 when there is no registered agent, until such time as a registered office is designated and a registered agent appointed.

(e) No foreign corporation which has been domesticated under the provisions of prior acts before July 1, 1957, shall hereafter have greater immunity from local jurisdiction than foreign corporations hereafter procuring a certificate of authority to transact business in this State and, to this end, every such domesticated foreign corporation, by continuing as a domesticated corporation in this State for a period of 90 days after July 1, 1957, shall be deemed to have expressly appointed the Secretary of State as its agent to receive service of process as fully as if it had made an application for a certificate of authority pursuant to the requirements of G.S. 55-138. (1955, c. 1371, s. 1; 1957, c. 979, ss. 18, 19.)

§ 55-154. Transacting business without certificate of authority.

(a) No foreign corporation transacting business in this State without permission obtained through a certificate of authority under this Chapter or through domestication under prior acts shall be permitted to maintain any action or proceeding in any court of this State unless such corporation shall have obtained a certificate of authority prior to trial; nor shall any action or proceeding be maintained in any court of this State by any successor or assignee of such corporation on any cause of action arising out of the transaction of business by such corporation in this State until:

- (1) A certificate of authority shall have been obtained by such corporation or by a foreign corporation which has acquired substantially all of its assets, or
- (2) Substantially all of its assets have been acquired by a domestic corporation or one or more individuals.

An issue arising under this subsection must be raised by motion and determined by the trial judge prior to trial.

(b) The failure of a foreign corporation to obtain a certificate of authority to transact business in this State shall not impair the validity of any contract or act of such corporation, and shall not prevent such corporation from defending any action or proceeding in any court of this State.

(c) A foreign corporation failing to obtain permission to transact business in this State as required by this Chapter or by prior acts then applicable shall be liable to the State for the years or parts thereof during which it transacted business in this State without such permission in an amount equal to all fees and taxes which would have been imposed by law upon such corporation had it duly applied for and received such permission plus interest and all penalties imposed by law for failure to pay such fees and taxes, plus five hundred dollars (\$500.00) and costs. The Attorney General shall bring actions to recover all amounts due the State under the provisions of this section.

(d) The Secretary of State is hereby directed to require that every foreign corporation transacting business in this State comply with the provisions of this Chapter. The Secretary of State is authorized to employ such assistants as shall be deemed necessary in his office for the purpose of enforcing the provisions of this Article and for making such investigations as shall be necessary to ascertain foreign corporations now transacting business in this State which may have failed to comply with the provisions of this Chapter. (1901, c. 2, s.

57; 1903, c. 76; Rev., s. 1194; 1915, c. 263; C.S., s. 1181; 1935, c. 44; 1937, c. 343; 1939, c. 57; G.S., ss. 55-118, 55-120; 1953, c. 1152; 1955, c. 1371, s. 1.)

Legal Periodicals. — For an article entitled, "Foreign Corporations in North Carolina: The 'Doing Business' Standards of Qualification, Taxation, and Jurisdiction," see 16 Wake Forest L. Rev. 711 (1980).

CASE NOTES

Editor's Note. — Many of the cases cited below were decided under former statutory provisions.

Constitutionality. — Nothing in the United States or State Constitution prohibits the State, in the exercise of its police power, from making the transaction of business by a foreign corporation prior to procuring a license an indictable offense. *State v. Agey*, 171 N.C. 831, 88 S.E. 726 (1916).

The only restriction of the Constitution is that the license tax must not interfere with interstate commerce or be otherwise invalid. *Pittsburg Life & Trust Co. v. Young*, 172 N.C. 470, 90 S.E. 568 (1916).

Contracts Not Avoided by Noncompliance. — The contracts of a foreign corporation doing business in this State without compliance with the statute as to domestication are not avoided; the penalty alone is enforceable by action as the statute prescribes. *Miller v. Howell*, 184 N.C. 119, 113 S.E. 621 (1922). See *G. Ober & Sons Co. v. Katzenstein*, 160 N.C. 439, 76 S.E. 476 (1912).

Action by State for Penalty. — See *Blackwell's Durham Tobacco Co. v. American*

Tobacco Co., 144 N.C. 352, 57 S.E. 5 (1907); *G. Ober & Sons Co. v. Katzenstein*, 160 N.C. 439, 76 S.E. 476 (1912).

Attorney General as Party to Declaratory Judgment Action. — In a proceeding for a declaratory judgment against the Attorney General and the Secretary of State relative to the application of registration provisions to plaintiff, a foreign corporation, the Attorney General was not a real party defendant, but, being charged with the enforcement of the statute, he should be retained as a nominal defendant along with the Secretary of State where the constitutionality of the statute was being challenged. *NAACP v. Eure*, 245 N.C. 331, 95 S.E.2d 893 (1957).

Applied in State ex rel. *Glamorgan Pipe & Foundry Co. v. Benfield*, 266 N.C. 342, 145 S.E.2d 912 (1966).

Stated in *Westarc Leasing Corp. v. Capital Sign Serv., Inc.*, 268 N.C. 601, 151 S.E.2d 204 (1966).

Cited in *Ralph Stachon & Assocs. v. Greenville Broadcasting Co.*, 35 N.C. App. 540, 241 S.E.2d 884 (1978).

ARTICLE 11.

Fees and Taxes.

§ 55-155. Fees.

- (a) In addition to any taxes prescribed by G.S. 55-156, the Secretary of State shall collect the following fees and remit them to the State Treasurer for the use of the State:
- (1) For filing an application to reserve or register a corporate name and for filing an application to renew such a registration (G.S. 55-12(f) and (h)), \$ 5.00
 - (2) For filing a notice of transfer of a reserved corporate name (G.S. 55-12(g)), 5.00
 - (3) For filing articles of incorporation (G.S. 55-7), 5.00
 - (4) For filing an application of a foreign corporation for a certificate of authority to transact business in this State and issuing a certificate of authority (G.S. 55-138), 5.00
 - (5) For filing a statement of classification of shares (G.S. 55-42(e)), 5.00
 - (6) For filing a statement of the change of a registered office or registered agent, or both, of a domestic or foreign corporation (G.S. 55-14, 55-142, 55-153), 3.00

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| (7) For filing a notice of resignation of a registered agent (G.S. 55-14(d)), | \$1.00 |
| (8) For filing a notice of resignation of a nonresident director under G.S. 55-33(a), | 1.00 |
| (9) For filing a certificate of reduction of capital (G.S. 55-48), | 5.00 |
| (10) For filing articles of amendment (G.S. 55-103), | 5.00 |
| (11) For filing a copy of an amendment to the articles of incorporation of a foreign corporation holding a certificate of authority to transact business in this State (G.S. 55-147), | 5.00 |
| (12) For filing a restated charter (G.S. 55-105), | 5.00 |
| (13) For filing an application of a foreign corporation for an amended certificate of authority to transact business in this State and issuing an amended certificate of authority (G.S. 55-149), | 5.00 |
| (14) For filing articles of merger or consolidation (G.S. 55-109), | 5.00 |
| (15) Repealed by Session Laws 1969, c. 751, s. 45. | |
| (16) For filing a copy of articles of merger of a foreign corporation holding a certificate of authority to transact business in this State (G.S. 55-148), | 5.00 |
| (17) For filing a statement setting forth the name and address in this State of the registered agent of a foreign corporation not transacting business in this State (G.S. 55-145), | 5.00 |
| (18) For receiving any service of process as statutory agent either of a corporation or of a director of a corporation (G.S. 55-15(b), 55-33(d), 55-146), | 3.00 |
| which amount may be recovered from the adverse party as taxable costs by the party to the action or proceeding causing such service to be made if such party prevails in the action or proceeding. | |
| (19) For issuing a certificate of revocation of authority of a foreign corporation (G.S. 55-152), | 5.00 |
| (20) Repealed by Session Laws 1969, c. 751, s. 45. | |
| (21) For filing an application for withdrawal of a foreign corporation and issuing a certificate of withdrawal (G.S. 55-150), | 5.00 |
| (22) For filing articles of voluntary dissolution by directors (G.S. 55-116), | 5.00 |
| (23) For filing articles of voluntary dissolution by written consent of shareholders (G.S. 55-117), | 5.00 |
| (24) For filing articles of voluntary dissolution by action of directors and stockholders (G.S. 55-118), | 5.00 |
| (25) For filing a statement of revocation of dissolution (G.S. 55-120), | 2.00 |
| (26) For filing a certificate of completed liquidation (G.S. 55-121), | 2.00 |
| (27) For preparing and furnishing a copy of any document, instrument or paper filed or recorded relating to a corporation (G.S. 55-4(c)): | |
| For the first page thereof, | 1.00 |
| For each additional page, | .40 |
| For affixing his certificate and official seal thereto, | 2.00 |
| (28) For comparing a copy furnished to him of any document, instrument or paper filed or recorded relating to a corporation: | |
| For each page, | .20 |

For affixing his certificate and official seal thereto, \$2.00

(29) For filing any other document not herein specifically provided for, 5.00

(b) The filing fees hereinbefore prescribed do not include copies or certified copies and the fees for such copies are those prescribed by subdivisions (27) and (28) of subsection (a) of this section.

(c) For recording and copying any corporate document or paper required by this Chapter to be recorded in his office, the register of deeds shall collect such amounts as are prescribed by G.S. 161-10 or other applicable laws. (1957, c. 1180; 1967, c. 823, s. 20; 1969, c. 751, ss. 43, 45; c. 797, s. 4; 1975, 2nd Sess., c. 981, s. 1.)

§ 55-156. Taxes.

(a) In addition to any fees prescribed by G.S. 55-155, on filing any of the following certificates or papers relative to corporations in the office of the Secretary of State, the following taxes shall be collected by the Secretary of State, and remitted to the State Treasurer for the use of the State:

(1) Articles of incorporation:

For each \$1,000 of the total amount of capital stock authorized, \$.40
but in no case less than 40.00
nor more than 1,000

(2) Articles of amendment which include an authorization to increase capital stock:

For each \$1,000 of the total increase authorized,40
but in no case less than 40.00
nor more than 1,000

(3) Articles of amendment which do not include an authorization to increase capital stock, 40.00

(4) Articles of dissolution, 5.00

(5) Application by foreign corporation for certificate of authority to transact business in this State:

For each \$1,000 of its authorized capital stock,40
but in no case less than 40.00
nor more than 500.00

(6) Articles of merger or consolidation which increase the authorized capital stock which the surviving or new corporation, domestic or foreign, will have authority to issue above the aggregate authorized capital stock which the constituent domestic corporations and constituent foreign corporations authorized to transact business in this State had authority to issue:

For each \$1,000 of the total amount of such increase40
but in no case less than 40.00
nor more than 1,000

(7) Articles of merger or consolidation which do not increase the authorized capital stock which the surviving or new corporation, domestic or foreign, will have authority to issue above the aggregate authorized capital stock which the constituent domestic corporations and constituent foreign corporations authorized to transact business in this State had authority to issue, 40.00

(b) For the purpose of computing taxes under this section, shares of no par value shall be treated as if they were of one dollar (\$1.00) par value. (1957, c. 1180; 1969, c. 751, s. 42; c. 797, s. 5.)

Legal Periodicals. — For article entitled, "Foreign Corporations in North Carolina: The 'Doing Business' Standards of Qualification, Taxation, and Jurisdiction," see 16 Wake Forest L. Rev. 711 (1980).

ARTICLE 12.

Curative Provisions.

§ 55-157. Curative act; amendments prior to 1901.

All amendments to the plan of incorporation of any corporation organized under the provisions of the general laws of North Carolina prior to the passage of the act entitled "An Act to Revise the Corporation Law of North Carolina," being Chapter 2, Public Laws of 1901, are declared to be valid in all respects, whether such amendments were made in accordance with the provisions of Chapter 380 of the Public Laws of 1893, or in accordance with the provisions of Chapter 2 of the Public Laws of 1901, but no amendment shall be validated by this section unless it is an amendment of such nature as is authorized to be made under the provisions of Chapter 2 of the Public Laws of 1901. (1905, c. 316; Rev., s. 1248; C.S., s. 1134; G.S., s. 55-35; 1955, c. 1371, s. 2.)

§ 55-158. Certain corporate conveyances validated.

All deeds and conveyances of land in this State, made by any corporation of this State prior to January 1, 1971, executed in its corporate name and signed and attested by its proper officers, from which the corporate seal was omitted, shall be good and valid, notwithstanding the failure to attach said corporate seal. (1939, c. 23; 1949, c. 436; G.S., s. 55-41; 1955, c. 1371, s. 2; 1957, c. 500, s. 2; 1971, c. 60.)

CASE NOTES

Quoted in *Investors Corp. v. Field Fin. Corp.*, 5 N.C. App. 156, 167 S.E.2d 852 (1969).

§ 55-159. Certain deeds executed by banks validated.

All deeds heretofore executed by banks and attested by the cashier, assistant cashier, secretary or assistant secretary thereof, which deeds are otherwise regular and valid, are hereby validated. (1943, c. 219, s. 1½; G.S., s. 55-41.1; 1955, c. 1371, s. 2.)

§ 55-160. Certain conveyances of corporations now dissolved validated.

All deeds and conveyances of land in this State, made by any corporation of this State prior to January 1, 1969, executed in its corporate name and signed by either its president, vice-president or secretary, and sealed with the common seal of the corporation, where said corporation has been dissolved for at least seven years, and said deed or conveyance has been on record for at least seven years, shall be good and valid, notwithstanding the failure of one of such officers to sign such instrument. (1949, c. 825; G.S., s. 55-41.2; 1955, c. 1371, s. 2; 1979, c. 364.)

§ 55-161. Conveyances by corporations owned by the United States government.

The Home Owners Loan Corporation and any corporation, the majority of whose stock is owned by the United States government, may convey lands, and/or other property which is transferable by deed which is duly executed by either an officer, manager, or agent of said corporation, sealed with the common seal and has attached thereto a signed and attested resolution under seal of the board of directors of said corporation authorizing the said officer, manager or agent to execute, sign, seal and attest deeds, conveyances and/or other instruments. This section shall be deemed to have been complied with if an attested resolution is recorded separately in the office of the register of deeds in the county where the land lies, which said resolution shall be applicable to all deeds executed subsequently thereto and pursuant to its authority.

All deeds, conveyances or other instruments which have been executed prior to March 15, 1951, in the manner prescribed above, if otherwise sufficient, shall be valid, and shall have the effect to pass the title to the real and/or personal property described therein. (1941, c. 294; 1951, c. 395; G.S., s. 55-42; 1955, c. 1371, s. 2.)

§ 55-162. Validation of amendments to corporate charters extending corporate existence.

In every case where a private corporation, chartered under the general laws of the State of North Carolina, has continued to act and do business as a corporation after the expiration of its period of existence as theretofore fixed in its charter, and has thereafter filed in the office of the Secretary of State an amendment to its charter to extend or renew its corporate existence, such amendment is hereby validated and made effective for all intents and purposes to the same extent and with the same effect as if such amendment had been made within the period of such corporation's existence as theretofore fixed in its charter. (1947, c. 504, s. 1; G.S., s. 55-164.1; 1955, c. 1371, s. 2.)

§ 55-163. Limitation of actions attacking validity of corporate action on grounds amendment not filed during corporate existence.

No action or proceeding shall be brought or defense or counterclaim pleaded later than one year after the ratification of this Article in which either the continued existence of such corporation or the validity of any of the contracts, acts, deeds, rights, privileges, powers, franchises and titles of such corporation is attacked or otherwise questioned on the grounds that such amendment was not filed within the period of such corporation's existence as theretofore fixed in its charter. (1947, c. 504, s. 2; G.S., s. 55-164.2; 1955, c. 1371, s. 2.)

§ 55-164. Clarification of intent of § 55-163.

In no event shall the limitation provided in G.S. 55-163 bar any action, proceeding, defense or counterclaim based upon grounds other than those mentioned in G.S. 55-163, unless the grounds set out in G.S. 55-163 are an essential part thereof. (1947, c. 504, s. 3; G.S., s. 55-164.3; 1955, c. 1371, s. 2.)

§ 55-164.1. New corporations organized to succeed to rights in corporate charter forfeited.

Whenever the charter of a corporation created under the laws of the State of North Carolina has, on account of failure to make any report or return or to pay any tax or fee for such length of time as to lose its charter, and where thereafter, under the laws of the State of North Carolina, a new charter is issued, in the same name as the original corporation, and on behalf of the same corporation, such new corporation shall succeed to the same properties, to the same rights as the original corporation before losing its charter on account of neglect hereinbefore mentioned.

Whenever such new corporation shall have been created, under the laws of this State, all the title, rights and emoluments to the property held by the original corporation shall inure to the benefit of the newer corporation and the new corporation shall issue its stock to the stockholders in the defunct corporation, in the same number and with the same par value held by the stockholders of the defunct corporation.

Such new corporation shall have the rights and privileges of maintaining any action or cause of action which the defunct corporation might maintain, bring or defend and to all intents and purposes the new corporation shall take the place of the defunct corporation to the same intent and purposes as if the defunct corporation has never expired by reason of its failure to make the reports hereinbefore referred to. (1959, c. 1316, s. 28½; 1973, c. 469, s. 45.)

§ 55-164.2. Certain corporate documents acknowledged and recorded before January 1, 1977, validated.

In all cases where a deed, deed of trust or other document executed by a corporation is permitted or required by law to be recorded and said deed, deed of trust or document was properly executed, acknowledged and recorded before January 1, 1977, except the acknowledgment of the officer or officers of the corporation was taken in their individual capacity rather than in their capacity as officers of said corporation, said deed, deed of trust or other document shall be construed to be a deed, deed of trust or other document of the same force and effect as if said acknowledgment was in every way proper. (1977, c. 40, s. 1.)

ARTICLE 13.

Miscellaneous Provisions.

§ 55-165. Interrogatories by Secretary of State.

The Secretary of State may propound to any corporation, domestic or foreign which he has reason to believe is subject to the provisions of this Chapter, and to any officer or director thereof, such written interrogatories as may be reasonably necessary and proper to enable him to ascertain whether such corporation is subject to the provisions of this Chapter or has complied with all the provisions of this Chapter applicable to it. Such interrogatories shall be answered within 30 days after the mailing thereof, or within such additional time as shall be fixed by the Secretary of State, and the answers thereto shall be full and complete and shall be made in writing and under oath. If such interrogatories be directed to an individual they shall be answered by him, and if directed to a corporation they shall be answered by the president, vice-president, secretary or assistant secretary thereof. The Secretary of State need not file any document to which such interrogatories relate until such

interrogatories be answered as herein provided, and not then if the answers thereto disclose that such document is not in conformity with the provisions of this Chapter. The Secretary of State shall certify to the Attorney General, for such action as the Attorney General may deem appropriate, all interrogatories and answers thereto which disclose a violation of any of the provisions of this Chapter, requiring or permitting action by the Attorney General. (1955, c. 1371, s. 1.)

CASE NOTES

Cited in *Good Will Distribs. (N.), Inc. v. Currie*, 251 N.C. 120, 110 S.E.2d 880 (1959).

§ 55-166. Penalties imposed upon corporations, officers and directors for failure to answer interrogatories.

(a) Each corporation, domestic or foreign, that fails or refuses to answer truthfully and fully within the time prescribed by this Chapter interrogatories propounded by the Secretary of State in accordance with the provisions of this Chapter, shall be deemed to be guilty of a misdemeanor.

(b) Each officer and director of a corporation, domestic or foreign, who fails or refuses within the time prescribed by this Chapter to answer truthfully and fully interrogatories propounded to him by the Secretary of State in accordance with the provisions of this Chapter, or who signs any articles, statement, report, application or other document filed with the Secretary of State which is known to such officer or director to be false in any material respect, shall be guilty of a misdemeanor. (1955, c. 1371, s. 1.)

§ 55-167. Information disclosed by interrogatories.

Interrogatories propounded by the Secretary of State and the answers thereto shall not be open to public inspection nor shall the Secretary of State disclose any facts or information obtained therefrom except insofar as his official duty may require the same to be made public or in the event such interrogatories or the answers thereto are required for evidence in any criminal proceedings or in any other action or proceedings by this State. (1955, c. 1371, s. 1.)

§ 55-168. Powers of Secretary of State.

The Secretary of State shall have the power and authority reasonably necessary to enable him to administer this Chapter efficiently and to perform the duties therein imposed upon him. (1955, c. 1371, s. 1.)

§ 55-169. Certificates and certified copies to be received in evidence.

All certificates issued by the Secretary of State in accordance with the provisions of this Chapter, and all copies of documents filed in his office in accordance with the provisions of this Chapter when certified by him, shall be taken and received in all courts, public offices, and official bodies as prima facie evidence of the facts therein stated. (1955, c. 1371, s. 1.)

Cross References. — As to conclusiveness of articles of incorporation as evidence, see § 55-8.

§ 55-170. Forms of documents required to be filed in office of Secretary of State.

Any document required to be filed in the office of the Secretary of State shall be made in such form, if any, as may be prescribed by the Secretary of State pursuant to the provisions of this Chapter. (1955, c. 1371, s. 1.)

§ 55-171. Photostatic copies of documents acceptable for filing or recording.

When any document is required or permitted to be filed or recorded by this Chapter, a photostatic or other photographic copy of such document may be filed or recorded in lieu of the original instrument. Such filing or recording shall have the same force and effect as if the original instrument had been so filed or recorded. (1955, c. 1371, s. 1.)

§ 55-172. Waiver of notice.

Whenever any notice is required to be given to any shareholder or director of a corporation under the provisions of this Chapter or under the provisions of the charter or bylaws of the corporation, a waiver thereof in writing signed by the person or persons entitled to such notice, whether before or after the time stated therein, shall be equivalent to the giving of such notice. (1955, c. 1371, s. 1.)

§ 55-173. Notice to director or shareholder outside the United States.

Any requirement of this Chapter or of the charter or bylaws, with respect to the giving or sending of any notice or communication to any shareholder or director as such whose address as it appears upon the records of the corporation is outside of the United States, shall be dispensed with, and no action taken shall be affected or invalidated by the failure to give or send any such notice or communication, insofar as compliance with any such requirement is at the time prohibited by, or dependent upon, the obtaining of a license or consent under, any act of Congress or any rules, regulations, proclamations, or executive orders purported to be issued under authority of any such act. (1955, c. 1371, s. 1.)

§ 55-174. Reserve power.

The General Assembly reserves the power to amend or repeal the charter of any corporation hereafter or heretofore formed and to amend or repeal this Chapter or any part thereof, and the rights of any corporation or of any shareholder, director or officer in any corporation are subject to this reservation. This Chapter, including this reservation, is a part of the charter contract between the shareholders. The power so reserved includes the power to authorize charter amendments which are to be effectuated pursuant to consent by the shareholders in the manner permitted by this Chapter, as now enacted or as subsequently amended. (1901, c. 2, s. 7; Rev., s. 1136; C.S., s. 1135; G.S., s. 55-36; 1955, c. 1371, s. 1.)

§ 55-175. Cross references.

Whenever in this Chapter, as enacted or as hereafter amended, whether by enactment of additional provisions or otherwise, reference is made to a section of this Chapter or of any other Chapter of the statutes of this State, such reference shall, unless otherwise provided, extend to and include any amendment of the section so referred to or any section hereafter enacted in lieu of the section so referred to. (1955, c. 1371, s. 1.)

Chapter 55A.

Nonprofit Corporation Act.

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ARTICLE 1.

General Provisions.

§ 55A-1. Title.

This Chapter shall be known and may be cited as the Nonprofit Corporation Act. (1955, c. 1230.)

Cross References. — As to jurisdiction of the superior court division over proceedings under this Chapter, see § 7A-249.

Editor's Note. — Session Laws 1955, c. 1230, in enacting this Chapter, repealed all provisions relating to nonprofit corporations in Chapter 55 of the General Statutes, except as

the provisions apply to hospital service corporations regulated by Chapter 57 of the General Statutes.

Legal Periodicals. — For article, "Legal Aspects of Changing University Investment Strategies," see 58 N.C.L. Rev. 189 (1980).

CASE NOTES

Cited in *Adams v. Flora Macdonald College*, 247 N.C. 648, 101 S.E.2d 809 (1958); *Coats v. Sampson County Mem. Hosp.*, 264 N.C. 332, 141 S.E.2d 490 (1965); *Sigmund Sternberger*

Foundation v. Tannenbaum, 273 N.C. 658, 161 S.E.2d 116 (1968); *Fuquay-Varina Tobacco Bd. of Trade v. Hardin*, 316 F. Supp. 366 (E.D.N.C. 1970).

§ 55A-2. Definitions.

As used in this Chapter, unless the context otherwise requires, the term:

- (1) "Board of directors" means the group of persons vested by the corporation with the management of its affairs whether or not such group is designated as directors in the charter.
- (2) "Bylaws" means rules adopted for the regulation or management of the affairs of the corporation irrespective of the name or names by which such rules are designated.
- (3) "Charter" includes the original articles of incorporation and all amendments thereto including articles of merger.
- (4) "Corporation" or "domestic corporation" means a nonprofit corporation subject to the provisions of this Chapter, except a foreign corporation.
- (5) "Foreign corporation" means a nonprofit corporation organized under laws other than the laws of this State.
- (6) "Insolvent" means inability of a corporation to pay its debts as they become due in the usual course of its affairs.
- (7) "Member" means one having membership rights in a corporation in accordance with the provisions of its charter or bylaws.
- (8) "Nonprofit corporation" means a corporation intended to have no income or intended to have income none of which is distributable to its members, directors, or officers, and includes all marketing associations without capital stock formed under Chapter 54 of the General Statutes or under any act or acts replaced thereby. (1955, c. 1230; 1959, c. 1161, s. 4.)

§ 55A-3. Applicability of Chapter.

(a) The provisions of this Chapter relating to domestic corporations shall apply to:

- (1) All corporations hereafter organized under this Chapter.
- (2) All nonprofit corporations heretofore organized under any act hereby repealed, except nonprofit corporations having capital stock.
- (3) All nonprofit corporations without capital stock heretofore or hereafter organized under any other act, unless there is some other specific statutory provision particularly applicable to such corporations or inconsistent with some provisions of this Chapter, in which case that other provision prevails. Nothing herein shall apply to hospital and medical service corporations as defined in Chapter 57 of the General Statutes which were incorporated prior to July 1, 1957, or repeal or modify the provisions of G.S. 54-138.

(b) The provisions of this Chapter relating to foreign corporations shall apply to all such corporations conducting affairs in this State for purposes for which a corporation might be organized under this Chapter. (1955, c. 1230; 1967, c. 659.)

Legal Periodicals. — For article, "Legal Aspects of Changing University Investment Strategies," see 58 N.C.L. Rev. 189 (1980).

ARTICLE 2.

*Execution and Filing of Certain Corporate Documents.***§ 55A-4. Execution of corporate documents for filing; filing, recording and effectiveness.**

(a) Whenever the provisions of this Chapter require any document relating to a corporation to be executed and filed in accordance with this section, unless otherwise specifically stated in this Chapter:

- (1) There shall be an original executed document and also one conformed copy.
- (2) The said original document shall, if required to be executed by the corporation, be signed by the president or a vice-president and also by the secretary or an assistant secretary, with or without the corporate seal. If required to be executed by designated individuals each of them shall sign.
- (3) Except where the provisions of this Chapter specifically require acknowledgment, the said original document shall be verified by each of the individuals signing, whether in a representative capacity or otherwise, by a statement under oath, made before and certified by an official who is authorized under the laws of this State to take acknowledgments, declaring that he signed the said document, that the statements therein are true, and, in the case of an individual who signed in a representative capacity, declaring the capacity in which he signed and that he was authorized so to sign.
- (4) The conformed copy may either extend its conformation with the original document through all the verifications (or acknowledgments, as the case may be) or may in lieu of such extension contain the legend, after the name of the signers, substantially as follows:
"Original duly verified (acknowledged) by all signers."
- (5) The original document so signed and verified (or acknowledged, as the case may be), together with the conformed copy, shall be delivered to the Secretary of State. Unless he finds that it does not conform to law, the Secretary of State shall, when the proper taxes and fees have been tendered, endorse upon the original the word "filed" and the hour, day, month, and year of the filing thereof, and shall file the same in his office. The Secretary of State shall thereupon immediately compare the copy with the original and if he finds that they are identical he shall make upon the conformed copy the same endorsement which appears on the original and shall attach to the copy a certificate stating that attached thereto is a true copy of the document, designated by an appropriate title, filed in his office and showing the date of such filing. He shall thereupon return the copy so certified to the corporation or its representative.
- (6) The copy, certified as aforesaid, shall be promptly delivered to the register of deeds of the county wherein the corporation has its registered office, and, when the proper fees shall have been tendered, it shall be recorded and properly indexed in a book to be known as the Record of Incorporations. Promptly after recordation, the register of deeds shall note the fact of recordation on the said copy and return it to the corporation or its representative.

(b) Any such document required to be filed shall be completely effective when endorsed by the Secretary of State as provided in subsection (a)(5) above and the transaction to be effectuated thereby shall thereupon be deemed to be completely consummated as if all the required recording had been perfected,

provided, however, that in lieu of the time of such endorsement by the Secretary of State, such document may fix an hour, day, month and year not more than 20 days subsequent to the endorsement of the Secretary of State and the transaction shall be deemed to be completely consummated at the time fixed by such document as if all the required recording had been perfected. Unless otherwise provided in this Chapter with respect to some specific document, failure to deliver it for recording in the office of the register of deeds shall only subject the corporation to a penalty of one hundred dollars (\$100.00) to be collected by the Secretary of State.

(c) It shall be the duty of the Secretary of State, whenever so requested and upon tender of the proper fees, to certify as aforesaid any true copy of any such document on file in his office or, if such be the request, to make or cause to be made typewritten or photostatic copies of such documents and to certify the same as aforesaid. (1955, c. 1230; 1967, c. 13, s. 2; c. 823, s. 21.)

ARTICLE 3.

Formation, Name and Registered Office.

§ 55A-5. Purposes.

Nonprofit corporations may be organized under this Chapter for any lawful purposes. Where by law special provisions are made for the organization of designated classes of nonprofit corporations, such corporations shall be formed under those provisions and not hereunder. (1955, c. 1230.)

Legal Periodicals. — For article, "Legal Aspects of Changing University Investment Strategies," see 58 N.C.L. Rev. 189 (1980).

§ 55A-6. Incorporators.

One or more natural persons, whether or not residents of this State, of the age of 18 years or more may act as incorporators of a corporation by signing and acknowledging articles of incorporation, which shall be filed according to G.S. 55A-4. The acknowledgment shall be before an officer duly authorized under the laws of this State to take the proof or acknowledgment of deeds. (1955, c. 1230; 1969, c. 875, s. 1; 1971, c. 1231, s. 1.)

§ 55A-7. Articles of incorporation.

(a) The articles of incorporation shall set forth:

- (1) The name of the corporation.
- (2) The period of duration, which may be perpetual.
- (3) The purpose or purposes for which the corporation is organized.
- (4) If the corporation is to have no members, a statement to that effect.
- (5) If the corporation is to have one or more classes of members, any provision which the incorporators elect to set forth in the articles of incorporation designating the class or classes of members and stating the qualifications and rights of the members of each class.
- (6) If the directors or any of them are not to be elected or appointed by one or more classes of members, a statement of the manner in which such directors shall be elected or appointed, in which case provision may be made for their election by other designated associations, corporations or individuals or by any combination of the votes of such persons. In lieu thereof, the charter may provide that the method of election of directors be left to the bylaws.

- (7) Any provisions, not inconsistent with law, which the incorporators elect to set forth in the charter (including, if desired, provisions with respect to the relative rights or interests of the members as among themselves or in the property of the corporation, the manner of termination of membership in the corporation, the rights, upon such termination, of the corporation, the terminated member and the remaining members, the transferability or nontransferability of memberships, and the distribution of assets on liquidation or for subordinating and subjecting the corporation to the authority of any head or national association, lodge, order, beneficial association, fraternal or beneficial society, foundation, federation or other nonprofit corporation, society, organization or association).
 - (8) The address, including county and city or town, and street and number, if any, of its initial registered office, which shall be in this State, and the name of its initial registered agent at such address.
 - (9) The number of persons constituting the initial board of directors, by whatever name called, and the names and addresses, including street and number, if any, of the persons who are to serve as the initial board.
 - (10) The name and address, including street and number, if any, of each incorporator.
- (b) It shall not be necessary to set forth in the articles of incorporation any of the corporate powers enumerated in this Chapter. (1955, c. 1230; 1957, c. 979, s. 11; 1959, c. 1161, s. 5.)

§ 55A-8. Corporate existence; filing of articles of incorporation; effect.

The time when corporate existence begins is determined by the provisions of G.S. 55A-4, and a copy of the articles certified by the Secretary of State shall be conclusive evidence that all conditions precedent required to be performed by the incorporators have been complied with and that the corporation has been incorporated under this Chapter, except as against this State in a proceeding to annul or revoke the articles of incorporation. (1955, c. 1230; 1967, c. 13, s. 4.)

§ 55A-9. Organization meeting of directors.

After the filing of the articles of incorporation in the office of the Secretary of State an organization meeting of the board of directors named in the articles of incorporation shall be held, either within or without this State, at the call of a majority of the directors, for the purpose of adopting bylaws, electing officers and the transaction of such other business as may come before the meeting. The directors calling the meeting shall give at least three days notice thereof by mail to each director so named, which notice shall state the time and place of the meeting, unless notice is waived as hereinafter provided. Any action permitted to be taken at the organizational meeting may be taken without a meeting of the board of directors and shall be deemed board action if it complies with the requirements of G.S. 55A-86. (1955, c. 1230; 1969, c. 875, s. 2.)

§ 55A-10. Corporate name.

(a) The corporate name shall not contain any word or phrase likely to mislead the public or which indicates or implies that it is organized for any purpose other than one or more of the purposes contained in its charter.

(b) The corporate name shall not, subject to the provisions of G.S. 55A-60, be the same as, or deceptively similar to, the name of any domestic corporation,

whether for profit or not for profit, or of any foreign corporation, whether for profit or not for profit, authorized to transact business or conduct affairs in this State, or a corporate name the exclusive right to which is at the time reserved or registered by some other person in the manner prescribed in this section or G.S. 55-12.

(c) The exclusive right to a corporate name not prohibited by this section may be reserved for a period of 90 days by:

- (1) Any person intending to organize a corporation under this Chapter,
- (2) Any domestic corporation intending to change its name,
- (3) Any foreign corporation intending to make application for a certificate of authority to conduct affairs in this State,
- (4) Any foreign corporation authorized to conduct affairs in this State and intending to change its name, or
- (5) Any person intending to organize a foreign corporation and intending to have such corporation make application for a certificate of authority to conduct affairs in this State.

The same name shall not be reserved for two or more consecutive 90-day periods by the same applicant or for the use and benefit of the same applicant; nor shall such consecutive reservations be made of names so similar as to fall within the prohibition of this section.

(d) Any person or corporation acquiring the good will of a domestic corporation or of a foreign corporation authorized to conduct affairs in this State may, on furnishing the Secretary of State satisfactory evidence of such acquisition, reserve the exclusive right to the corporate name of the said corporation for a period of 10 years.

(e) The reservation of name, pursuant to subsections (c) and (d) of this section, shall be made by filing with the Secretary of State a verified application therefor stating the name and address of the applicant, and the Secretary of State shall, upon tender of the fee hereinafter prescribed, reserve the name exclusively for the applicant unless he finds that the name is not available under the provisions of this section.

(f) The exclusive right to a specified corporate name reserved hereunder, may, on tender of the fee hereinafter prescribed, be transferred to any other person or corporation by filing in the office of the Secretary of State a notice of such transfer, executed by the applicant for whom the name was reserved and specifying the name and address of the transferee.

(g) Any foreign corporation not conducting affairs in this State may register its corporate name, if not prohibited by this section, by filing with the Secretary of State a verified application therefor setting forth the name and address of the principal office of the corporation, the jurisdiction in which it is incorporated, the date of its incorporation, a statement that it is organized and conducting affairs in good standing under the laws of the jurisdiction in which it is incorporated, and a brief statement of the business in which it is engaged; and the Secretary of State shall, upon tender of the fee prescribed by G.S. 55A-77(a), register the name exclusively for the use of such foreign corporation, unless he finds that the name is not available under the provisions of this section. Such registration shall be effective for a period of one year, and it may be renewed from year to year, not to exceed 10 years, by filing with the Secretary of State a verified renewal application setting forth the same facts required to be set forth in the original application for registration. Any renewal application filed after the expiration of the registration shall be treated as a new application for registration.

(h) The Secretary of State may revoke any reservation or registration of a corporate name if he finds, upon a hearing held not less than five days after written notice has been sent by registered mail to the person or corporation who made the reservation or registration, that the application therefor or any transfer thereof was not made in good faith or that any statement contained

in the application for reservation or registration was false when such application was filed or has thereafter become false.

(i) The use by a corporation of a name in violation of this section may be enjoined notwithstanding the filing of its articles by the Secretary of State. (1955, c. 1230; 1969, c. 875, s. 3.)

§ 55A-11. Registered office and registered agent.

(a) Each corporation shall have and continuously maintain in this State:

- (1) A registered office which may be, but need not be, the same as its principal office.
- (2) A registered agent, which agent may be either an individual resident in this State whose business office is identical with such registered office, or a domestic corporation, whether for profit or not for profit, or a foreign corporation, whether for profit or not for profit, authorized to transact business or conduct affairs in this State, having an office identical with such registered office.

(b) A corporation formed prior to July 1, 1957, which has not designated a principal office is required on and after July 1, 1957, to designate a registered office and a registered agent in the manner, as near as may be, provided in G.S. 55A-12; other corporations formed prior to July 1, 1957, shall not be required to, but may, designate a registered office and a registered agent in the manner, as near as may be, provided in G.S. 55A-12. (1955, c. 1230; 1957, c. 979, s. 20.)

§ 55A-12. Change of registered office or registered agent.

(a) A corporation may change its registered office or its registered agent, or both. To effectuate such change, a statement shall be executed by the corporation and filed, in accordance with the provisions of G.S. 55A-4 setting forth:

- (1) The name of the corporation.
- (2) The address, including county and city or town, and street and number, if any, of its then registered office.
- (3) If the address of its registered office be changed, the address, including county and city or town, and street and number, if any; to which the registered office is to be changed.
- (4) The name of its then registered agent.
- (5) If its registered agent be changed, the name of its successor registered agent.
- (6) That the address of its registered office and the address of the office of its registered agent, as changed, will be identical.
- (7) That such change was authorized by resolution duly adopted by its board of directors.

(b) If the change in the registered office is to another county, a copy of such statement certified by the Secretary of State shall be recorded both in the old county and in the new county, and there shall also be recorded in the new county, in the manner prescribed by G.S. 55A-4, a similarly certified copy of the corporation's charter.

(c) If the statement purporting to effectuate such changes is not recorded in all the offices wherein recording is required by this section, persons asserting claims against the corporation may treat as the registered agent or registered office of the corporation either the one newly designated in the statement or the preexisting one.

(d) Any registered agent of a corporation may resign as such agent upon filing a written notice thereof, executed in duplicate, with the Secretary of State, who shall forthwith mail a copy thereof to the corporation at its registered office, or, in the case of a foreign corporation, to the address of the principal office of the corporation in the state or country under the laws of

which it is incorporated. The appointment of such agent shall terminate upon the expiration of 30 days after receipt of such notice by the Secretary of State.

(e) In lieu of the procedure set out in subsection (a) above, the location of the registered office of a domestic corporation may be changed from one address to another in the same city or town in this State upon the change of the business office of its registered agent, upon the making and executing by the registered agent of such corporation of a certificate, duly acknowledged before an officer authorized by the laws of this State to take acknowledgments of deeds, setting forth the name of each corporation represented by such registered agent and the address at which such registered agent has maintained a registered office for each of such corporations and further certifying to the new address to which such registered office will be transferred on a given day and at which new address such registered agent will thereafter maintain the registered office of the corporations recited in the certificate. Such certificate shall be filed in duplicate in the office of the Secretary of State who shall then furnish a certified copy of the same, showing the date of such filing, and shall return the copy so certified to the registered agent, and the copy, certified as aforesaid, shall, within 60 days after the receipt by the registered agent, be delivered to the register of deeds of the county wherein the corporation has its registered office, and, when the proper fees shall have been tendered, it shall be recorded and properly indexed in a book to be known as the Record of Incorporations. Promptly after the recordation, the register of deeds shall note the fact of recordation on the said copy and return it to the registered agent. The fee to be charged by the Secretary of State for the filing of such certificate shall be three dollars (\$3.00) for each corporation listed in said certificate, the total not to exceed two hundred dollars (\$200.00). (1955, c. 1230; 1957, c. 979, ss. 12, 13; 1973, c. 314, ss. 1, 2.)

§ 55A-13. Service of process on corporation.

(a) Service upon the registered agent appointed by a corporation of any process, notice or demand required or permitted by law to be served upon the corporation shall be binding upon the corporation.

(b) Whenever a corporation shall fail to appoint or maintain a registered agent in this State, or whenever its registered agent cannot with due diligence be found at the registered office, then the Secretary of State shall be an agent of such corporation upon whom any such process, notice or demand may be served. Service on the Secretary of State of any such process, notice or demand shall be made by delivering to and leaving with him, or with any clerk having charge of the corporation department of his office, duplicate copies of such process, notice or demand. In the event any such process, notice or demand is served on the Secretary of State, he shall immediately cause one of the copies thereof to be forwarded by registered or certified mail, addressed to the corporation at its registered office. Any such corporation so served shall be in court for all purposes from and after the date of such service on the Secretary of State.

(c) The Secretary of State shall keep a record of all processes, notices and demands served upon him under this section, and shall record therein the time of such service and his action with reference thereto.

(d) Nothing herein contained shall limit or affect the right to serve any process, notice or demand required or permitted by law to be served upon a corporation in any other manner now or hereafter permitted by law. (1955, c. 1230; 1977, 2nd Sess., c. 1219, s. 35.)

§ 55A-14. Bylaws.

The initial bylaws of a corporation shall be adopted by its board of directors. The power to alter, amend, or repeal the bylaws or adopt new bylaws shall be vested in the board of directors unless otherwise provided in the charter or the bylaws. The initial bylaws adopted by the directors or any bylaws adopted by the members may contain any provisions, not inconsistent with law or the charter, with respect to: voting rights and the manner of conducting votes on any matter, the relative rights or interests of the members as among themselves or in the property of the corporation, the manner of termination of membership in the corporation, the rights, upon such termination, of the corporation, the terminated member and the remaining members, and the transferability or nontransferability of memberships. Any bylaws lawfully adopted may contain any additional provisions, not inconsistent with law or the charter, for the regulation and management of the affairs of the corporation, including any provision for penalties for violation of its rules. (1955, c. 1230.)

CASE NOTES

Cited in Snug Harbor Property Owners Ass'n
v. Curran, 55 N.C. App. 199, 284 S.E.2d 752
(1981).

ARTICLE 4.

Powers and Management.

§ 55A-15. General powers.

- (a) Every corporation shall have power:
- (1) To have perpetual succession by its corporate name unless a limited period of duration is stated in its charter.
 - (2) To sue and be sued, complain and defend, in its corporate name.
 - (3) To have a corporate seal which may be altered at pleasure, and to use the same by causing it, or a facsimile thereof, to be impressed or affixed or in any other manner reproduced.
 - (4) To elect or appoint officers and agents of the corporation, and define their duties and fix their compensation.
 - (5) To make and alter bylaws, not inconsistent with its charter or with the laws of this State, for the administration and regulation of the affairs of the corporation.
 - (6) If the charter so provides, to make donations for the public welfare or for religious, charitable, scientific or educational purposes; and in time of war to make donations in aid of war activities.
 - (7) If the charter so provides, to lend money to its employees other than its officers and directors and otherwise to assist its employees, officers, and directors.
 - (8) Subject to any restrictions in the charter, to provide by bylaw, agreement, vote of board of directors or members, or otherwise, for indemnification of any director or officer or former director or officer of the corporation or any person who may have served at its request as a director or officer of another corporation, whether for profit or not for profit, against expenses actually and necessarily incurred by him in connection with the defense of any action, suit or proceeding in which he is made a party by reason of being or having been such

director or officer, except in relation to matters as to which he shall be adjudged in such action, suit or proceeding to have acted in bad faith or to have been liable or guilty by reason of willful misconduct in the performance of duty.

(9) To cease its corporate activities and surrender its corporate franchise.

(10) Notwithstanding any other provision of law, a nonprofit corporation or association which operates a public hospital owned by a county, city, hospital district or hospital authority is hereby authorized to purchase liability insurance to protect its officers and directors in any suits alleging actual or alleged negligent acts, errors, omissions or breach of duty in the management of the corporation or association.

(b) In connection with carrying out the purposes stated in its charter, and subject to any limitation prescribed by this Chapter or in its charter, every corporation shall also have power:

(1) To purchase, take, receive, lease, take by gift, devise or bequest, or otherwise acquire, own, hold, improve, use and otherwise deal in and with, real or personal property, or any interest therein, wherever situated.

(2) To sell, convey, mortgage, pledge, lease, exchange, transfer and otherwise dispose of all or any part of its property and assets.

(3) To acquire, by purchase, subscription, gift, will or otherwise, and to own, hold, vote, use, employ, sell, mortgage, lend, pledge, or otherwise dispose of, and otherwise use and deal in and with, shares or other interests in, or obligations of, domestic or foreign business corporations, associations, partnerships or individuals, or direct or indirect obligations of the United States or of any government, state, territory, governmental district or municipality or of any instrumentality thereof.

(4) To make contracts and incur liabilities, borrow money, issue its notes, bonds, and other obligations, and secure any of its obligations by mortgage or pledge of all or any of its property, franchises and income.

(5) To procure for its benefit insurance on the life or physical or mental ability of any employee, including any officer, or, in case of a religious, educational, or charitable corporation, any sponsor, contributor, student or former student, whose death or disability might cause financial loss to the corporation, and to this end the corporation has an insurable interest in the lives of each of such persons.

(6) To lend money for its corporate purposes, invest its funds from time to time, and take and hold real and personal property as security for the payment of funds so loaned or invested.

(7) To conduct its affairs, carry on its operations, and have offices and exercise the powers granted by this Chapter anywhere in the world.

(8) To have and exercise all powers necessary or convenient to effect any or all of the purposes for which the corporation is organized.

(c) The foregoing powers shall be limited as follows for any corporation organized under this Chapter which shall be classified as a "private foundation" as that term is defined by section 509 of the Internal Revenue Code of 1954 or corresponding provisions of any subsequent federal tax laws, unless any such corporation shall, by its articles of incorporation or amendment thereto, specifically state that it does not intend to be so limited:

(1) Each such corporation shall make distributions of such amounts, for each taxable year, at such time and in such manner as not to become subject to the tax imposed by section 4942 of the Internal Revenue Code of 1954, or corresponding provisions of any subsequent federal tax laws.

(2) No such corporation shall engage in any act of self-dealing as defined in section 4941(d) of the Internal Revenue Code of 1954, or corresponding provisions of any subsequent federal tax laws.

- (3) No such corporation shall retain any excess business holdings as defined in section 4943(c) of the Internal Revenue Code of 1954, or corresponding provisions of any subsequent federal tax laws.
- (4) No such corporation shall make any investments in such manner as to subject it to tax under section 4944 of the Internal Revenue Code of 1954, or corresponding provisions of any subsequent federal tax laws.
- (5) No such corporation shall make any taxable expenditures as defined in section 4945(d) of the Internal Revenue Code of 1954, or corresponding provisions of any subsequent federal tax laws. (1955, c. 1230; 1957, c. 783, s. 7; 1969, c. 875, s. 4; 1971, c. 1136, s. 1; 1977, c. 236, s. 1; c. 663; 1979, c. 1027.)

Legal Periodicals. — For survey of 1977 law on business associations, see 56 N.C.L. Rev. 939 (1977).

For article, "Legal Aspects of Changing University Investment Strategies," see 58 N.C.L. Rev. 189 (1980).

§ 55A-16. Special powers; public parks and drives and certain recreational corporations.

Any corporation heretofore or hereafter formed for the purpose of creating and maintaining public parks and drives shall have full power and authority to lay out, manage, and control parks and drives within the State, under such rules and regulations as the corporation may prescribe, and shall have power to purchase and hold property and take gifts or donations for such purpose. It may hold property and exercise such powers and trust for any town, city, township, or county, in connection with which said parks and drives shall be maintained. Any city, town, township, or county, holding such property, may vest and transfer the same to any such corporation for the purpose of controlling and maintaining the same as public parks and drives under such regulations and subject to such conditions as may be determined upon by such city, town, township, or county. All such lands as the corporation may acquire shall be held in trust as public parks and drives, and shall be held open to the public under such rules, laws, and regulations as the corporation may adopt through its board of directors, and it shall have power and authority to make and adopt all such laws and regulations as it may determine upon for the reasonable management of such parks and drives. The terms "public parks and drives" as used in this section shall be construed so as to include playgrounds, recreational centers, and other recreational activities and facilities which may be provided and established under the sponsorship of any county, city, town, township, or school district in North Carolina and constructed or established with the assistance of the government of the United States or any agency thereof. (1955, c. 1230; 1973, c. 695, s. 9.)

CASE NOTES

Exclusion of Negroes from Golf Course Operated by Nonprofit Corporation. — A city cannot own and operate a golf course for the public and exclude Negro citizens from the privileges thereof on account of their color. Nor can Negroes be excluded from a golf course

owned by the city and leased to a nonprofit corporation which was organized solely for the purpose of taking the lease and maintaining and operating the course as a public golf course. *Simkins v. City of Greensboro*, 149 F. Supp. 562 (M.D.N.C.), *aff'd*, 246 F.2d 425 (4th Cir. 1957).

§ 55A-17. Defense of ultra vires.

No act of a corporation and no conveyance or transfer of real or personal property to or by a corporation shall be invalid by reason of the fact that the corporation was without capacity or power to do such act or to make or receive such conveyance or transfer, but such lack of capacity or power may be asserted:

- (1) In any action by a member or a director against the corporation to enjoin the doing of any act or the transfer of real or personal property by or to the corporation, but in any such action the plaintiff shall sustain the burden of proof that he has not at any time thereto assented to the act or transfer in question and that in bringing the action he is not acting in collusion with officials of the corporation. If the unauthorized acts or transfer sought to be enjoined are being, or are to be, performed or made pursuant to any contract to which the corporation is a party, the court may, if all of the parties to the contract are parties to the action and if deemed equitable, set aside and enjoin the performance of such contract, and in so doing may allow to the corporation or to the other parties to the contract, as the case may be, compensation for the loss or damage sustained by either of them which may result from the action of the court in setting aside and enjoining the performance of such contract, but anticipated profits to be derived from the performance of the contract shall not be awarded by the court as loss or damage sustained.
- (2) In an action by the corporation or by its receiver, trustee or other legal representative, or by its members in a representative suit, against the incumbent or former officers or directors of the corporation.
- (3) In an action by the Attorney General, to dissolve the corporation, or in an action by the Attorney General to enjoin the corporation from the transaction of unauthorized business, or in a proceeding by the Secretary of State to revoke a certificate of authority of a foreign corporation, pursuant to G.S. 55A-73. (1955, c. 1230.)

§ 55A-17.1. Indemnification of directors, officers, employees or agents; general provisions.

(a) The indemnification of a director or officer of a corporation permitted by this section or by G.S. 55A-17.2 and 55A-17.3 shall not be deemed exclusive of any other rights to which such director or officer may be entitled, under any bylaw, agreement, vote of board of directors or members, or otherwise with respect to any liability or litigation expenses arising out of his activities as director or officer.

(b) As used in this section and in G.S. 55A-17.2 and 55A-17.3, the term "person" includes the legal representative of such person.

(c) Anything in this section or in G.S. 55A-17.2 or 55A-17.3 to the contrary notwithstanding, a corporation shall have the power to purchase and maintain insurance on behalf of any person who is or was a director, officer, employee or agent of the corporation, or is or was serving at the request of the corporation as a director, officer, employee or agent of another corporation, partnership, joint venture, trust or other enterprise against any liability asserted against him and incurred by him in such capacity, or arising out of his status as such, whether or not the corporation would have the power to indemnify him against such liability.

(d) Expenses incurred by a director, officer, employee or agent in defending a civil or criminal action, suit or proceeding may be paid by the corporation in advance of the final disposition of such action, suit or proceeding as authorized by the board of directors in the specific case upon receipt of an undertaking by

or on behalf of the director, officer, employee or agent to repay such amount unless it shall be ultimately determined that he is entitled to be indemnified by the corporation as authorized in this section, or in G.S. 55A-17.2 or 55A-17.3, or by any bylaw, agreement, vote of board of directors or members, or otherwise. (1977, c. 236, s. 2.)

Legal Periodicals. — For survey of 1977 law on business associations, see 56 N.C.L. Rev. 939 (1977).

§ 55A-17.2. Indemnification in actions by outsiders.

(a) When by reason of the fact that he is or was serving as director, officer, employee or agent of a corporation, or in any such capacity at the request of the corporation in any other corporation, partnership, joint venture, trust or other enterprise, any person is or was a party or is threatened to be made a party to any threatened, pending or completed action, suit or proceedings, whether civil, criminal, administrative or investigative, not brought by the corporation nor brought by any party seeking derivatively to enforce a liability of such a person to the corporation, such person shall be entitled to indemnification, or reimbursement by the corporation for any expenses, including attorneys' fees, or any liabilities which he may have incurred in consequence of such action, suit or proceeding, under the following conditions:

- (1) If such person is wholly successful in his defense on the merits, or if the proceeding is an administrative or investigative proceeding which does not result in the indictment, fine or penalty of such person, he shall be entitled to reimbursement from the corporation of all his reasonable expenses of defense or participation, including attorneys' fees.
- (2) If such person is wholly successful in his defense otherwise than solely on the merits, the corporation may pay or agree to pay to him such expenses of defense or participation, including attorneys' fees, as the board of directors in good faith shall deem reasonable, regardless of any adverse interest of any or all of the directors.
- (3) If such person is not wholly successful or is unsuccessful in his defense, or with the proceeding to which he is a party results in his indictment, fine or penalty, the corporation may pay or agree to pay, in whole or in part, such expenses of defense or participation, including attorneys' fees, and the amount of any judgment, money decree, fine, penalty or settlement for which he may have become liable, if
 - a. A plan for such payment, in the case of corporations which have members, is approved by a consent in writing signed by the members entitled to vote or such plan is sent to the members entitled to vote, with notice of a members' meeting, whether annual or special, to be held to take action thereon and if at such meeting a plan is approved by a majority of such members, exclusive of those members to be benefited by the plan if approved, or
 - b. A majority of a quorum consisting of directors who are not parties to such action, suit or proceeding shall determine that such person acted in good faith and in a manner he reasonably believed to be in or not opposed to the best interests of the corporation, and with respect to any criminal action or proceeding, had no reasonable cause to believe his conduct was unlawful; and, if the corporation has members, after such determination by the directors, the corporation shall, not later than 60 days before any such payment or agreement to pay is made, send to all members of record on a

record date not more than 10 days prior to the date of mailing, at their registered addresses, a statement specifying the persons to be paid, the amounts to be paid, and the nature and status of the suit or proceedings at the time of mailing.

- c. In a proceeding brought by such person for such determination in the superior court of the district where the corporation has its registered office it shall be determined that such person acted in good faith and in a manner he reasonably believed to be in or not opposed to the best interests of the corporation, and, with respect to any criminal action or proceeding, had no reasonable cause to believe his conduct was unlawful. In such a proceeding, if the corporation has members, the court in its discretion may order notice thereof to be sent to such members in such manner and in such form as it may deem appropriate, at the expense of the corporation; and it may allow all members so notified to be heard in opposition to the determination requested.

(b) The termination of any action, suit or proceeding by judgment, order, settlement, conviction, or upon plea of nolo contendere or its equivalent, shall not, of itself, create a presumption that the person did not act in good faith and in a manner which he reasonably believed to be in the best interests of the corporation, and, with respect to any criminal action or proceeding, had reasonable cause to believe that his conduct was unlawful. (1977, c. 236, s. 2.)

§ 55A-17.3. Indemnity for litigation expenses in corporate action.

(a) When a present or former director, officer, employee or agent of a corporation or any person who has served or is serving in such capacity at the request of the corporation in any other corporation, partnership, joint venture, trust or other enterprise, is sued, alone or with others, in the courts of this State, in any action seeking to establish his liability to the corporation arising out of his alleged dereliction of duty to the corporation, he shall in turn be entitled to indemnification or reimbursement from the corporation for so much of his expenses of defense, including attorneys' fees, as the court in its discretion, upon motion for indemnification or reimbursement, duly made in such action, finds to be reasonable, if:

- (1) Such person is successful in whole or in part in the action against him or in any settlement thereof and the court finds that his conduct fairly and equitably merits such relief; or
- (2) The court finds, despite his adjudication of liability, that such person has acted honestly and reasonably and that, in view of all the circumstances of the case, his conduct fairly and equitably merits such relief.

(b) When such action is brought in another state and the result thereof is as would have entitled the defendant officer or director to make a motion in the cause for indemnification or reimbursement of his expenses of defense under subsection (a) of this section if the action had been brought in this State, but no such relief is available in the state in which the action is actually brought, the defendant officer or director may bring a separate action against the corporation in this State for such indemnification or reimbursement as he might have recovered had the suit against him been brought in this State. Notice of said action for indemnification or reimbursement shall be sent, in such form as the court may approve and at the corporation's expense, to the party or parties plaintiff in the prior action who shall be entitled to be heard.

(c) Whenever indemnification or reimbursement as permitted in this section is sought from a corporation which has members, the court may in its discretion order notice of the claim thereof to be sent to the members in such manner and

in such form as it may approve, at the expense of the corporation. All members so notified may be heard in opposition to the relief requested. (1977, c. 236, s. 2.)

§ 55A-18. Loans to directors and officers prohibited.

No loans shall be made by a corporation to its directors or officers. The directors of a corporation who vote for or assent to the making of a loan to a director or officer of the corporation, and any officer or officers participating in the making of such loan, shall be jointly and severally liable to the corporation for the amount of such loan until the repayment thereof. (1955, c. 1230.)

§ 55A-19. Board of directors.

The affairs of a corporation shall be managed by a board of directors. Directors need not be residents of this State or members of the corporation unless the charter or the bylaws so require. The charter or the bylaws may prescribe other qualifications for directors. (1955, c. 1230.)

§ 55A-20. Number, election and term of directors.

(a) The number constituting the board of directors of a corporation shall be not less than three. The number constituting the initial board of directors shall be fixed by the articles of incorporation. In the absence of a provision in the articles of incorporation, the charter, or the bylaws fixing the number of directors, the number shall be the same as that fixed in the articles of incorporation for the initial board of directors, subject to the provisions of this section. The articles of incorporation, the charter, or the bylaws may provide for a maximum and minimum number of directors, and, if so, shall designate the manner in which such number shall from time to time be determined. If the fixing of a maximum and minimum number of directors is authorized and the corporation has members entitled to vote for directors, the articles of incorporation, the charter, or the bylaws may provide that any directorships not filled by the members shall be treated as vacancies to be filled by and in the discretion of the board of directors.

(b) The number of directors may be increased or decreased from time to time only by amendment to the bylaws, unless the charter provides that a change in the number of directors shall be made only by amendment of the charter. No decrease in number shall have the effect of shortening the term of any incumbent director.

(c) The first board of directors shall consist of those named in the articles of incorporation. Thereafter, if the corporation has members entitled to vote for directors, directors shall be elected by the members entitled to vote at the first annual meeting and at each subsequent annual meeting of the members. Such election may be by mail if the bylaws so provide. If the corporation does not have members or members entitled to vote for directors, directors shall be elected or appointed in the manner and for the terms as provided in the bylaws. In the absence of a provision fixing the term of office, the term of office of a director shall be one year.

(d) Directors may be divided into classes and the terms of office of the several classes need not be uniform. Each director shall hold office for the term for which he is elected or appointed and until his successor shall have been elected or appointed and qualified.

(e) Election of directors by the members shall be by ballot unless the charter or the bylaws otherwise provide.

(f) A director may be removed from office pursuant to any procedure therefor set forth in a charter provision, including one adopted by amendment after he was elected or appointed as director. (1955, c. 1230; 1973, c. 192, ss. 1, 2.)

§ 55A-21. Vacancies.

Any vacancy occurring in the board of directors and any directorship to be filled by reason of an increase in the number of directors may be filled by the board of directors unless the charter or the bylaws provide that a vacancy or directorship so created shall be filled in some manner, in which case such provision shall control. A director elected or appointed, as the case may be, to fill a vacancy shall be elected or appointed for the unexpired term of his predecessor in office. (1955, c. 1230.)

§ 55A-22. Quorum of directors.

A majority of the number of directors fixed by the charter or bylaws shall constitute a quorum for the transaction of business unless otherwise provided in the charter or the bylaws; but in no event shall a quorum consist of less than one third of the number of directors so fixed or stated. If the number of directors of a nonprofit corporation without members falls below the number necessary for a quorum, the remaining directors, however reduced in number, shall have authority to fill all vacancies in the board of directors. The act of the majority of the directors present at a meeting at which a quorum is present shall be the act of the board of directors, unless the act of a greater number is required by this Chapter, the charter, or the bylaws. (1955, c. 1230.)

§ 55A-23. Committees.

(a) Unless otherwise provided in the charter or bylaws, the board of directors, by resolution adopted by a majority of the number of directors then in office may designate one or more committees each of which shall consist of two or more directors, which committees, to the extent provided in such resolution, in the charter or in the bylaws of the corporation, shall have and exercise the authority of the board of directors in the management of the corporation, except that no such committee shall have authority as to the following matters:

- (1) The dissolution, merger or consolidation of the corporation; the amendment of the charter of the corporation; or the sale, lease or exchange of all or substantially all of the property of the corporation.
- (2) The designation of any such committee or the filling of vacancies in the board of directors or in any such committee.
- (3) The amendment or repeal of the bylaws, or the adoption of new bylaws.
- (4) The amendment or repeal of any resolution of the board which by its terms shall not be so amendable or repealable.

(b) Other committees not having and exercising the authority of the board of directors in the management of the corporation may be designated by a resolution adopted by a majority of the directors present at a meeting at which a quorum is present.

(c) Any committee, or any member thereof may be discharged or removed by action of a majority of the board of directors pursuant to the provisions of G.S. 55A-22 or 55A-86. The designation of any committee and the delegation thereto of authority shall not operate to relieve the board of directors or any member thereof, of any responsibility or liability imposed upon it or him by law. (1955, c. 1230; 1969, c. 875, s. 5.)

Editor's Note. — Section 55A-86, referred to in this section, was repealed by Session Laws 1977, c. 193. See now § 55A-33.1.

§ 55A-24. Place and notice of directors' meetings.

(a) Meetings of the board of directors, regular or special, may be held either within or without this State, and upon such notice as the bylaws may prescribe.

(b) Unless the bylaws otherwise provide, special meetings of the board of directors may be called by the president or by any two directors.

(c) Attendance of a director at any meeting shall constitute a waiver of notice of such meeting except where a director attends a meeting for the express purpose of objecting to the transaction of any business because the meeting is not lawfully called or convened.

(d) Unless the bylaws otherwise provide, neither the business to be transacted at, nor the purpose of, any regular or special meeting of the board of directors need be specified in the notice or written waiver of notice of such meeting. (1955, c. 1230.)

§ 55A-24.1. Informal or irregular action by directors or committees; attendance by telephone.

(a) Action taken by a majority of the directors or members of a committee without a meeting is nevertheless board or committee action if written consent to the action in question is signed by all the directors or members of the committee, as the case may be, and filed with the minutes of the proceedings of the board or committee, whether done before or after the action so taken.

(b) If a meeting of directors otherwise valid is held without proper call or notice, action taken at such meeting otherwise valid is deemed ratified by a director who did not attend unless promptly after having knowledge of the action taken and of the impropriety in question he files with the secretary or assistant secretary of the corporation his written objection to the holding of the meeting or to any specific action so taken.

(c) Unless otherwise provided in the charter or bylaws, any one or more directors or members of a committee may participate in a meeting of the board or committee by means of a conference telephone or similar communications device which allows all persons participating in the meeting to hear each other and such participation in a meeting shall be deemed presence in person at such meeting. (1973, c. 314, s. 3.)

§ 55A-25. Officers.

(a) The officers of a corporation shall consist of a president, one or more vice-presidents, a secretary, a treasurer and such other officers and assistant officers as may be deemed necessary, each of whom shall be elected or appointed at such time and in such manner, and for such terms not exceeding three years, as may be prescribed in the charter or the bylaws. In the absence of any such provision, all officers shall be elected or appointed annually by the board of directors. If the bylaws so provide, any two or more offices may be held by the same person, except the offices of president and secretary.

(b) The charter or the bylaws may provide that any one or more officers of the corporation shall be ex officio members of the board of directors.

(c) The officers of a corporation may be designated by such additional titles as may be provided in the charter or the bylaws. (1955, c. 1230.)

§ 55A-26. Removal of officers.

Any officer elected or appointed may be removed by the persons authorized to elect or appoint such officer whenever in their judgment the best interests of the corporation will be served thereby. The removal of an officer shall be without prejudice to the contract rights, if any, of the officer so removed.

Election or appointment of an officer or agent shall not of itself create contract rights. (1955, c. 1230.)

§ 55A-27. Books and records.

Each corporation shall keep correct and complete books and records of account and shall keep minutes of the proceedings of its members, board of directors, and committees having any of the authority of the board of directors. It shall keep at its registered office or principal office in this State a record of the names and addresses of its members entitled to vote and may keep all other books, records, and minutes without this State. All books and records of a corporation may be inspected by any member, or his agent or attorney, for any proper purpose at any reasonable time. (1955, c. 1230.)

§ 55A-27.1. Form of records.

Any records maintained by a corporation in the regular course of its business, including its books of account and minute books, may be kept on, or be in the form of, punch cards, magnetic tape, photographs, microphotographs, or any other information storage device; provided that the records so kept can be converted into clearly legible form within a reasonable time. Any corporation shall so convert any records so kept upon the request of any person entitled to inspect the same. Where records are kept in such manner, the cards, tapes, photographs, microphotographs or other information storage device together with a duly authenticated readout or translation shall be admissible in evidence, and shall be accepted for all other purposes, to the same extent as an original written record of the same information would have been. (1969, c. 875, s. 6.)

Legal Periodicals. — For survey of 1973 case law on the admissibility of computer print-outs, see 52 N.C.L. Rev. 903 (1974).

For article entitled, "Toward a Codification of the Law of Evidence in North Carolina," see 16 Wake Forest L. Rev. 669 (1980).

CASE NOTES

Purpose of Section. — This section was designed to give broad legislative approval to the use in evidence of corporate computer records. However, in declaring such computer records admissible in evidence it does not deal with the special problems of reliability created by the use of computers. *State v. Springer*, 283 N.C. 627, 197 S.E.2d 530 (1973).

Section authorizes admission of corporate computer records under appropriate safeguards deemed sufficient to render them trustworthy. *State v. Springer*, 283 N.C. 627, 197 S.E.2d 530 (1973).

But Does Not Preclude Judicial Development of Standards for Admission. — This section does not, and was not designed to, preclude judicial development of workable standards for the admission of computerized business records generally. *State v. Springer*, 283 N.C. 627, 197 S.E.2d 530 (1973).

Conditions under Which Printouts Are Admissible. — Printout cards or sheets of business records stored on electronic computing equipment are admissible in evidence, if

otherwise relevant and material, if: (1) The computerized entries were made in the regular course of business, (2) the entries were made at or near the time of the transaction involved, and (3) a proper foundation for such evidence is laid by testimony of a witness who is familiar with the computerized records and the methods under which they were made so as to satisfy the court that the methods, the sources of information, and the time of preparation render such evidence trustworthy. *State v. Springer*, 283 N.C. 627, 197 S.E.2d 530 (1973); *State v. Stapleton*, 29 N.C. App. 363, 224 S.E.2d 204, appeal dismissed, 290 N.C. 554, 226 S.E.2d 513 (1976).

Computer printout evidence may be refuted to the same extent as business records made in books of account. *State v. Springer*, 283 N.C. 627, 197 S.E.2d 530 (1973).

Testimony as to contents of computer printout is inadmissible under the best evidence rule. *State v. Springer*, 283 N.C. 627, 197 S.E.2d 530 (1973).

Failure to lay foundation for admission.
— Computer printout referred to in oral testimony is inadmissible where no foundation is laid for its admission and the printout itself is

not offered in evidence. *State v. Springer*, 283 N.C. 627, 197 S.E.2d 530 (1973).

Cited in *In re Arthur*, 291 N.C. 640, 231 S.E.2d 614 (1977).

§ 55A-28. Shares of stock and dividends prohibited.

A corporation shall not have or issue shares of stock. No dividend shall be paid and no part of the income of a corporation shall be distributed to its members, directors or officers. A corporation may pay compensation in a reasonable amount to its members, directors or officers for services rendered, may confer benefits upon its members in conformity with its purposes, and may make distributions upon dissolution or final liquidation as permitted by this Chapter. (1955, c. 1230.)

ARTICLE 5.

Members.

§ 55A-29. Members.

(a) A corporation may have one or more classes of members or may have no members. If the corporation has one or more classes of members, the designation of such class or classes and the qualifications and rights of the members of each class shall be set forth in the charter or in the initial bylaws adopted by the directors or in any bylaws adopted by the members. A corporation may issue certificates evidencing membership therein which may be transferable or nontransferable, as stated in the charter or bylaws.

(b) Unless the charter or bylaws contain provisions which adequately safeguard the property rights of expelled members, upon expulsion of a member who would be entitled to a distributive share of the corporation's assets upon its liquidation the corporation shall pay to the expelled member an amount equal to what the expelled member would receive if the corporation's assets were liquidated at the time of the expulsion. If the parties cannot agree upon this amount, each shall appoint an appraiser and those two appraisers shall appoint a third appraiser. The three appraisers shall, by majority action, after notice and hearing to both parties, determine the value of the expelled member's distributive share and the corporation shall immediately pay the amount thereof to the expelled member. If either party by registered letter addressed to the correct address of the other party requests in writing the appointment of appraisers and names the appraiser whom he appoints and indicates the amount which he believes to be the value of the expelled member's share, upon failure of the other party to appoint an appraiser within 30 days from receipt of, or refusal to receive the registered letter, the amount so indicated shall be the value of the share of the expelled members. (1955, c. 1230.)

§ 55A-30. Meetings of members.

(a) Meetings of members may be held at such place, either within or without this State, as may be provided in the bylaws. In the absence of any such provision all meetings shall be held at the registered office of the corporation in this State.

(b) An annual meeting of the members shall be held at such time as may be provided in the bylaws. Failure to hold the annual meeting at the designated time shall not work a forfeiture or dissolution of the corporation.

(c) Special meetings of the members may be called by the president or by the board of directors. Special meetings of the members may also be called by such other officers or persons or number or proportion of members as may be provided in the charter or the bylaws. In the absence of a provision fixing the number or proportion of members entitled to call a meeting, a special meeting of members may be called by members having one twentieth of the votes entitled to be cast at such meeting. (1955, c. 1230.)

§ 55A-31. Notice of members' meetings.

Unless the charter or bylaws otherwise provide, written or printed notice stating the place, day and hour of the meeting and, in case of a special meeting, the purpose or purposes for which the meeting is called, shall be delivered not less than 10 nor more than 50 days before the date of the meeting, either personally or by mail, by or at the direction of the president, or the secretary, or the officers or persons calling the meeting, to each member entitled to vote at such meeting. If mailed, such notice shall be deemed to be delivered when deposited in the United States mail addressed to the member at his address as it appears on the records of the corporation, with postage thereon prepaid. (1955, c. 1230.)

§ 55A-32. Voting.

(a) The right of the members, or any class or classes of members, to vote may be limited, enlarged or denied to the extent specified in the charter. Unless so limited, enlarged or denied, each member, regardless of class, shall be entitled to one vote on each matter submitted to a vote of members.

(b) A member may vote in person or, unless the charter or the bylaws otherwise provide may vote by proxy executed in writing by the member or by his duly authorized attorney-in-fact. No proxy shall be valid after 11 months from the date of its execution, unless otherwise provided in the proxy. Where directors or officers are to be elected by members, the bylaws may provide that such elections may be conducted by mail.

(c) The charter or the bylaws may provide that in all elections for directors every member entitled to vote shall have the right to cumulate his vote and to give one candidate a number of votes equal to his vote multiplied by the number of directors to be elected, or by distributing such votes on the same principle among any number of such candidates. (1955, c. 1230.)

§ 55A-33. Quorum.

The bylaws may provide the number or percentage of members entitled to vote represented in person or by proxy, or the number or percentage of votes represented in person or by proxy, which shall constitute a quorum at a meeting of members. In the absence of any such provision, members holding one tenth of the votes entitled to be cast represented in person or by proxy shall constitute a quorum. The vote of a majority of the votes entitled to be cast by the members present or represented by proxy at a meeting at which a quorum is present shall be necessary for the adoption of any matter voted upon by the members, unless a greater proportion is required by this Chapter, the charter or the bylaws. (1955, c. 1230.)

§ 55A-33.1. Action by members without a meeting.

Any action required by this Chapter to be taken at a meeting of the members may be taken without a meeting if a consent in writing, setting forth the action so taken, shall be signed by all of the members entitled to vote with respect to the subject matter thereof and filed with the secretary of the corporation as part of the corporate records, whether done before or after the action so taken. (1977, c. 193, s. 2.)

ARTICLE 6.***Fundamental Changes.*****§ 55A-34. Right to amend charter.**

A corporation may amend its charter from time to time in any and as many respects as may be desired, so long as its charter as amended contains only such provisions as are lawful under this Chapter. (1955, c. 1230.)

§ 55A-35. Procedure to amend charter.

(a) Amendments to the charter shall be made in the following manner:

(1) Where there are members having voting rights, the board of directors shall adopt a resolution setting forth the proposed amendment, and, except as otherwise provided in this paragraph, directing that it be submitted to a vote at a meeting of members having voting rights, which may be either an annual or a special meeting. In lieu thereof, a resolution setting forth a proposed amendment and requesting its submission to such a meeting may be approved in writing by the number or proportion of members entitled to call a members' meeting pursuant to G.S. 55A-30(c). Written or printed notice setting forth the proposed amendment or a summary of the changes to be effected thereby shall be given to each member entitled to vote at such meeting within the time and in the manner provided in this Chapter for the giving of notice of meetings of members. The proposed amendment shall be adopted upon receiving at least two thirds of the votes entitled to be cast by members present or represented by proxy at such meeting.

(2) Where there are no members, or no members having voting rights, an amendment shall be adopted at a meeting of the board of directors upon receiving the vote of a majority of the directors in office.

(b) Any number of amendments may be submitted and voted upon at any one meeting. (1955, c. 1230; 1981, c. 372.)

Effect of Amendments. — The 1981 amendment added the second sentence of subdivision (1) of subsection (a).

§ 55A-36. Articles of amendment.

The articles of amendment shall be executed by the corporation and filed as provided in G.S. 55A-4, and shall set forth:

(1) The name of the corporation.

(2) The amendment so adopted.

(3) Where there are members having voting rights a statement setting forth the date of the meeting of members at which the amendment was

adopted, that a quorum was present at such meeting, and that such amendment received at least two thirds of the votes entitled to be cast by members present or represented by proxy at such meeting.

- (4) Where there are no members, or no members having voting rights, a statement of such fact, the date of the meeting of the board of directors at which the amendment was adopted, and a statement of the fact that such amendment received the vote of a majority of the directors in office. (1955, c. 1230.)

§ 55A-37. Effect of certificate of amendment.

No amendment shall affect any existing cause of action in favor of or against such corporation, or its officers or directors, or any pending action to which such corporation, or its officers or directors, shall be a party, or the existing rights of persons other than members; and, in the event the corporate name shall be changed by amendment, no action brought by or against such corporation under its former name shall abate for that reason. (1955, c. 1230.)

§ 55A-37.1. Restated charter.

(a) At any time after its charter has been amended, a corporation may by action of its board of directors, without necessity of vote of the members, cause to be prepared a document entitled "Restated Charter," which shall integrate into one document its original articles of incorporation (or articles of consolidation) and all amendments thereto, including those affected by articles of merger or consolidation, except that: In lieu of the address of the initial registered office and the name of the initial registered agent, the restated charter shall state the address of the then registered office and the name of its then registered agent.

(b) The restated charter shall also set forth that it purports merely to restate but not to change the provisions of the original articles of incorporation as supplemented and amended and that there is no discrepancy, other than as expressly permitted by this section, between the said provisions and the provisions of the restated charter.

(c) The restated charter shall be executed by the corporation and be filed as provided in G.S. 55A-4.

(d) A copy of the restated charter certified by the Secretary of State shall be presumed, until otherwise shown, to be the full and true charter of the corporation as in effect on the date when so certified.

(e) A corporation may also integrate its articles of incorporation and all amendments thereto by the procedure provided in this Chapter for amending the charter. (1965, c. 762.)

Legal Periodicals. — For article, "Legal Aspects of changing University Investment Strategies," see 58 N.C.L. Rev. 189 (1980).

§ 55A-38. Procedure for merger.

(a) Any two or more domestic corporations may merge into one of such corporations pursuant to a plan of merger approved in the manner provided in this Chapter.

(b) The board of directors of each corporation shall, by resolution adopted by each such board, approve a plan of merger setting forth:

- (1) The names of the corporations proposing to merge, and the name of the corporation into which they propose to merge, which is hereinafter designated as the surviving corporation.

- (2) The name which the surviving corporation is to have, which name may be that of any of the corporations involved in the merger or any other available name permitted by this Chapter.
- (3) The terms and conditions of the proposed merger.
- (4) A statement of any changes in the charter of the surviving corporation to be effected by such merger.
- (5) Such other provisions not inconsistent with law as are deemed necessary or desirable. (1955, c. 1230.)

§ 55A-39. Procedure for consolidation.

(a) Any two or more domestic corporations may consolidate into a new corporation pursuant to a plan of consolidation approved in the manner provided in this Chapter.

(b) The board of directors of each corporation shall, by resolution adopted by each such board, approve a plan of consolidation setting forth:

- (1) The names of the corporations proposing to consolidate, and the name of the new corporation into which they propose to consolidate, which is hereinafter designated as the new corporation. The name of the new corporation may be that of any of the corporations involved in the consolidation or any other available name permitted by this Chapter.
- (2) The terms and conditions of the proposed consolidation.
- (3) With respect to the new corporation, all of the statements required to be set forth in articles of incorporation for corporations organized under this Chapter, except the names and addresses of the incorporators.
- (4) Such other provisions not inconsistent with law as are deemed necessary or desirable. (1955, c. 1230.)

§ 55A-40. Approval of merger or consolidation.

(a) A plan of merger or consolidation shall be adopted in the following manner:

- (1) Where the members of any merging or consolidating corporation have voting rights, the board of directors of such corporation shall adopt a resolution approving the proposed plan, and, except as otherwise provided in this paragraph, directing that it be submitted to a vote at a meeting of members having voting rights, which may be either an annual or a special meeting. Written or printed notice setting forth the proposed plan or a summary thereof shall be given to each member entitled to vote at such meeting within the time and in the manner provided in this Chapter for the giving of notice of meetings of members. The proposed plan shall be adopted upon receiving at least two thirds of the votes entitled to be cast by members present or represented by proxy at each such meeting.
- (2) Where any merging or consolidating corporation has no members, or no members having voting rights, a plan of merger or consolidation shall be adopted at a meeting of the board of directors of such corporation upon receiving the vote of a majority of the directors in office.

(b) After such approval, and at any time prior to the filing of the articles of merger or consolidation, the merger or consolidation may be abandoned pursuant to provisions therefor, if any, set forth in the plan of merger or consolidation. (1955, c. 1230.)

§ 55A-41. Articles of merger or consolidation.

(a) Upon such approval, articles of merger or articles of consolidation shall be executed by each corporation and filed as provided in G.S. 55A-4, except that a copy thereof certified by the Secretary of State shall also be recorded in the office of the register of deeds of each county wherein the constituent corporations have their registered offices.

(b) The articles of merger or consolidation shall set forth:

- (1) The plan of merger or the plan of consolidation.
- (2) Where the members of any merging or consolidating corporation have voting rights, then as to each such corporation, a statement setting forth the date of the meeting of members at which the plan was adopted, that a quorum was present at such meeting, and that such plan received at least two thirds of the votes entitled to be cast by members present or represented by proxy at such meeting.
- (3) Where any merging or consolidating corporation has no members, or no members having voting rights, then as to each such corporation a statement of such fact, the date of the meeting of the board of directors at which the plan was adopted and a statement of the fact that such plan received the vote of a majority of the directors in office.

(c) The time when the merger or consolidation is effected is determined by the provisions of G.S. 55A-4. (1955, c. 1230; 1967, c. 823, s. 22.)

§ 55A-42. Effect of merger or consolidation.

When such merger or consolidation has been effected:

- (1) The several corporations, parties to the plan of merger or consolidation, shall be a single corporation, which, in the case of a merger, shall be that corporation designated in the plan of merger as the surviving corporation, and, in the case of a consolidation, shall be the new corporation provided for in the plan of consolidation.
- (2) The separate existence of all corporations parties to the plan of merger or consolidation, except the surviving or new corporation, shall cease.
- (3) Such surviving or new corporation shall have all the rights, privileges, immunities and powers and shall be subject to all the duties and liabilities of a corporation organized under this Chapter.
- (4) Such surviving or new corporation shall thereupon and thereafter, to the extent consistent with its charter as established or changed by the merger or consolidation, possess all the rights, privileges, immunities, and franchises, as well of a public as of a private nature, of each of the merging or consolidating corporations; and all property, real, personal, and mixed, and all debts due on whatever account, and all other choses in action, and all and every other interest, of or belonging to or due to each of the corporations so merged or consolidated, shall be taken and deemed to be transferred to and vested in such single corporation without further act or deed; and the title to any real estate, or any interest therein, vested in any of such corporations shall not revert or be in any way impaired by reason of such merger or consolidation. The provisions of this subdivision are subject to the provisions of G.S. 47-18.1, with regard to the registration of certificates of merger or consolidation if the title to real property is affected.
- (5) Such surviving or new corporation shall thenceforth be responsible and liable for all the liabilities, obligations, and penalties of each of the corporations so merged or consolidated; and any claim existing or action or proceeding, civil or criminal, pending by or against any of such corporations may be prosecuted as if such merger or consolidation had not taken place, or such surviving or new corporation may be

substituted in its place; and any judgments rendered against any of the merged or consolidated corporations may be enforced against the surviving or new corporation. Neither the rights of creditors nor any liens upon the property of any merged or consolidated corporations shall be impaired by such merger or consolidation.

- (6) In the case of a merger, the charter of the surviving corporation shall be deemed to be amended to the extent, if any, that changes in its charter are stated in the plan of merger. In the case of a consolidation, the articles of consolidation shall be deemed to be the articles of incorporation of the new corporation. (1955, c. 1230; 1967, c. 950, s. 2.)

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When Separate Existence of Consolidating Corporations Terminated. — If a consolidation agreement is valid, upon the filing thereof in the office of the Secretary of

State the separate existence of each of the consolidating corporations is terminated. *Adams v. Flora Macdonald College*, 251 N.C. 617, 111 S.E.2d 859 (1960).

§ 55A-42.1. Merger or consolidation of domestic and foreign corporations.

(a) One or more foreign corporations and one or more domestic corporations may be merged or consolidated into a corporation of this State or of another state if such merger or consolidation is permitted by the laws of the state under which each such foreign corporation is organized.

(b) Each domestic corporation shall comply with the provisions of this Chapter with respect to the merger or consolidation, as the case may be, of domestic corporations and each foreign corporation shall comply with the applicable provisions of the laws of the state under which it is organized.

(c) If the surviving or new corporation, as the case may be, is a corporation of any state other than this State, it shall comply with the provisions of this Chapter with respect to foreign corporations if it is to transact business in this State; and if after the merger or consolidation it transacts no business in this State the courts of this State shall have jurisdiction in actions to enforce any obligation of any constituent corporation of this State arising out of any act or omission of such constituent corporation prior to the merger or consolidation, and process therein may be served as provided in G.S. 55A-68.

(d) The effect of such merger or consolidation shall be the same as in the case of the merger or consolidation of domestic corporations, if the surviving or new corporation is to be a corporation of this State. If the surviving or new corporation is to be a corporation of any state other than this State, the effect of such merger or consolidation shall be the same as in the case of the merger or consolidation of domestic corporations except insofar as the laws of such other state provide otherwise. (1973, c. 314, s. 4.)

§ 55A-43. Sale, lease, exchange, or mortgage of assets.

A sale, lease, exchange, mortgage, pledge or other disposition of all, or substantially all, the property and assets of a corporation may be made upon such terms and conditions and for such consideration, which may consist in whole or in part of money or property, real or personal, including shares of any corporation for profit, domestic or foreign, as may be authorized in the following manner:

- (1) Where there are members having voting rights, the board of directors shall adopt a resolution recommending such sale, lease, exchange,

mortgage, pledge or other disposition and directing that it be submitted to a vote at a meeting of members having voting rights, which may be either an annual or a special meeting. Written or printed notice stating that the purpose, or one of the purposes, of such meeting is to consider the sale, lease, exchange, mortgage, pledge or other disposition of all, or substantially all, the property and assets of the corporation shall be given to each member entitled to vote at such meeting, within the time and in the manner provided by this Chapter for the giving of notice of meetings of members. At such meeting the members may authorize such sale, lease, exchange, mortgage, pledge or other disposition and may fix, or may authorize the board of directors to fix, any or all of the terms and conditions thereof and the consideration to be received by the corporation therefor. Such authorization shall require the vote of at least two thirds of the votes entitled to be cast by members present or represented by proxy at such meeting. After such authorization by a vote of members, the board of directors, nevertheless, may, if so empowered by such authorization of the members, abandon such sale, lease, exchange, mortgage, pledge or other disposition of assets, subject to the rights of third parties under any contracts relating thereto, without further action or approval by members.

- (2) Where there are no members, or no members having voting rights, a sale, lease, exchange, mortgage, pledge or other disposition of all, or substantially all, the property and assets of a corporation shall be authorized upon receiving the vote of a majority of the directors in office. (1955, c. 1230.)

ARTICLE 7.

Dissolution and Liquidation.

§ 55A-44. Voluntary dissolution.

(a) A corporation may dissolve and wind up its affairs in the following manner:

- (1) Where there are members having voting rights, the board of directors shall adopt a resolution recommending that the corporation be dissolved, and directing that the question of such dissolution be submitted to a vote at a meeting of members having voting rights, which may be either an annual or a special meeting. Written or printed notice stating that the purpose, or one of the purposes, of such meeting is to consider the advisability of dissolving the corporation, shall be given to each member entitled to vote at such meeting, within the time and in the manner provided in this Chapter for the giving of notice of meetings of members. A resolution to dissolve the corporation shall be adopted upon receiving at least two thirds of the votes entitled to be cast by members present or represented by proxy.
- (2) Where there are no members, or no members having voting rights, the dissolution of the corporation shall be authorized at a meeting of the board of directors upon the adoption of a resolution to dissolve by the vote of a majority of the directors in office.

(b) Upon the adoption of such resolution by the members, or by the board of directors where there are no members or no members having voting rights, the corporation shall cease to conduct its affairs except insofar as may be necessary for the winding up thereof, shall immediately cause a notice of the proposed dissolution to be mailed to each known creditor of the corporation, and shall

proceed to collect its assets and apply and distribute them as provided in this Chapter. The corporation may follow the same procedure upon the expiration of any period of duration to which it is limited by its charter. (1955, c. 1230; 1973, c. 314, s. 5.)

§ 55A-44.1. Extension of duration after expiration.

(a) If a corporation has continued to conduct its business after the expiration of its charter, it may at any time amend its charter so as to extend or perpetuate its period of existence. Expiration of a charter does not of itself create any vested right on the part of any member or creditor to prevent such charter amendment.

(b) No acts or contracts of a corporation during the period within which it could have extended its existence as permitted in this section, whether or not it has taken action so to extend its existence, shall be in any degree invalidated by the expiration of the charter. (1973, c. 314, s. 6.)

§ 55A-45. Distribution of assets.

The assets of a corporation in the process of dissolution shall be applied and distributed as follows:

- (1) All liabilities and obligations of the corporation shall be paid, satisfied and discharged, or adequate provision shall be made therefor;
- (2) Assets held by the corporation upon condition requiring return, transfer or conveyance, which condition occurs by reason of the dissolution, shall be returned, transferred or conveyed in accordance with such requirements;
- (3) Assets received and held by the corporation subject to limitations permitting their use only for charitable, religious, eleemosynary, benevolent, educational or similar purposes, but not held upon a condition requiring return, transfer or conveyance by reason of the dissolution, shall be transferred or conveyed to one or more domestic or foreign corporations, societies, or organizations engaged in activities substantially similar to those of the dissolving corporation, pursuant to a plan of distribution adopted as provided in this Chapter;
- (4) Other assets, if any, shall be distributed in accordance with the provisions of the charter or the bylaws to the extent that the charter or bylaws determine the distributive rights of members, or any class or classes of members, or provide for distribution to others;
- (5) Any remaining assets may be distributed to such persons, societies, organizations or domestic or foreign corporations, whether for profit or not for profit, as may be specified in a plan of distribution adopted as provided in this Chapter. (1955, c. 1230.)

§ 55A-46. Plan of distribution.

A plan providing for the distribution of assets, not inconsistent with the provisions of this Chapter, may be adopted by a corporation in the process of dissolution and shall be adopted by a corporation for the purpose of authorizing any transfer or conveyance of assets for which this Chapter requires a plan of distribution, in the following manner:

- (1) Where there are members having voting rights, the board of directors shall adopt a resolution recommending a plan of distribution and directing the submission thereof to a vote at a meeting of members having voting rights, which may be either an annual or a special meeting. Written or printed notice setting forth the proposed plan of distribution or a summary thereof shall be given to each member

entitled to vote at such meeting, within the time and in the manner provided in this Chapter for the giving of notice of meetings of members. Such plan of distribution shall be adopted upon receiving at least two thirds of the votes entitled to be cast by members present or represented by proxy at such meeting.

- (2) Where there are no members, or no members having voting rights, a plan of distribution shall be adopted at a meeting of the board of directors upon receiving the vote of a majority of the directors in office. (1955, c. 1230.)

§ 55A-47. Revocation of voluntary dissolution proceedings.

(a) A corporation may, at any time prior to the issuance of a certificate of dissolution by the Secretary of State, revoke the action theretofore taken to dissolve the corporation, in the following manner:

- (1) Where there are members having voting rights, the board of directors shall adopt a resolution recommending that the voluntary dissolution proceedings be revoked, and directing that the question of such revocation be submitted to a vote at a meeting of members having voting rights, which may be either an annual or a special meeting. Written or printed notice stating that the purpose, or one of the purposes of such meeting is to consider the advisability of revoking the voluntary dissolution proceedings shall be given to each member entitled to vote at such meeting, within the time and in the manner provided in this Chapter for the giving of notice of meetings of members. A resolution to revoke the voluntary dissolution proceedings shall be adopted upon receiving at least two thirds of the votes entitled to be cast by members present or represented by proxy at such meeting.
- (2) Where there are no members having voting rights, a resolution to revoke the voluntary dissolution proceedings shall be adopted at a meeting of the board of directors upon receiving the vote of a majority of the directors in office.

(b) Upon the adoption of such resolution by the members, or by the board of directors where there are no members or no members having voting rights, the corporation may thereupon again conduct its affairs. (1955, c. 1230.)

§ 55A-48. Articles of dissolution.

If the voluntary dissolution proceedings have not been revoked, then when all debts, liabilities and obligations of the corporation shall have been paid and discharged, or adequate provision shall have been made therefor, and all of the remaining property and assets of the corporation shall have been transferred, conveyed or distributed in accordance with the provisions of this Chapter, articles of dissolution shall be executed and filed in accordance with the provisions of G.S. 55A-4, setting forth:

- (1) The name of the corporation.
- (2) Where there are members having voting rights, a statement setting forth the date of the meeting of members at which the resolution to dissolve was adopted, that a quorum was present at such meeting, and that such resolution received at least two thirds of the votes entitled to be cast by members present or represented by proxy at such meeting.
- (3) Where there are no members, or no members having voting rights, a statement of such fact, the date of the meeting of the board of directors at which the resolution to dissolve was adopted and a statement of the fact that such resolution received the vote of a majority of the directors in office.

- (4) That all debts, obligations, and liabilities of the corporation have been paid and discharged or that adequate provision has been made therefor.
- (5) That all the remaining property and assets of the corporation have been transferred, conveyed or distributed in accordance with the provisions of this Chapter.
- (6) That there are no suits pending against the corporation in any court, or that adequate provision has been made for the satisfaction of any judgment, order or decree which may be entered against it in any pending suit.
- (7) Where the corporation was dissolved upon the expiration of its charter, a statement of such fact, in lieu of the statement required by subdivision (2) or subdivision (3) above. (1955, c. 1230; 1973, c. 314, s. 7.)

§ 55A-49. Effect of filing of articles of dissolution; certificate of dissolution.

After the filing of articles of dissolution in the office of the Secretary of State he shall issue a certificate of dissolution and cause the same to be delivered to the corporation. Upon issuance of such certificate, the existence of the corporation shall cease, except for the purpose of suits, other proceedings and appropriate corporate action by members, directors and officers as provided in this Chapter. (1955, c. 1230.)

§ 55A-50. Involuntary dissolution in action by Attorney General.

A corporation may be dissolved involuntarily by a decree of the superior court in an action brought by the Attorney General in the name of the State when it is established that:

- (1) The corporation procured its charter through fraud; or
- (2) The corporation has, after written notice by the Attorney General given at least 20 days prior thereto, continued to exceed or abuse the authority conferred upon it by law, to the injury of the public, or of its members, creditors, or debtors; or
- (3) The corporation has, after written notice by the Attorney General given at least 20 days prior thereto, failed for 30 days to appoint and maintain a registered agent in this State, as required by G.S. 55A-11; or
- (4) The corporation has, after written notice by the Attorney General given at least 20 days prior thereto, failed for 30 days after change of its registered office or registered agent to file in the office of the Secretary of State a statement of such change, as required by G.S. 55A-12; or
- (5) The corporation has without justification refused to comply with a final court order for the production of its books, records, or other documents as required to be kept by G.S. 55A-27. (1955, c. 1230.)

Legal Periodicals. — For article entitled, "The Common Law Powers of the Attorney General of North Carolina," see 9 N.C. Cent. L.J. 1 (1977).

CASE NOTES

Cited in *Starbuck v. Town of Havelock*, 252 N.C. 176, 113 S.E.2d 278 (1960); *YWCA v. Morgan*, 281 N.C. 485, 189 S.E.2d 169 (1972).

§ 55A-51. Duties of Attorney General with respect to actions for involuntary dissolution.

Whenever the Attorney General has reason to believe that any corporation has given cause for dissolution as provided in G.S. 55A-50 and the case involves the public interest, it is the duty of the Attorney General to bring an action under that section. If the cause for dissolution does not involve the public interest, the Attorney General has a duty to bring an action if satisfactory security is given to indemnify the State against the costs and expenses to be incurred thereby. (1955, c. 1230.)

Legal Periodicals. — For article entitled, "General of North Carolina," see 9 N.C. Cent. L.J. 1 (1977).

§ 55A-52. Venue and service of process.

Every action by the Attorney General for the involuntary dissolution of a corporation shall be commenced in the superior court of the county in which the registered office of the corporation is situated. Summons shall issue and be served as in other civil actions. (1955, c. 1230.)

§ 55A-53. Power of court to liquidate assets and affairs of corporation.

(a) The superior court shall have power to liquidate the assets and affairs of a corporation:

- (1) In an action by a member or director when it is made to appear:
 - a. That the directors are deadlocked in the management of the corporate affairs and that irreparable injury to the corporation or the public is being suffered or is threatened by reason thereof, and either that the members are unable to break the deadlock or there are no members having voting rights; or
 - b. That the acts of the directors or those in control of the corporation are illegal, oppressive or fraudulent; or
 - c. That the corporate assets are being misapplied or wasted; or
 - d. That the corporation is unable to carry out its purposes.
- (2) In an action by a creditor:
 - a. When the claim of the creditor has been reduced to judgment and an execution thereon has been returned unsatisfied; or
 - b. When the corporation has admitted in writing that the claim of the creditor is due and owing and it is established that the corporation is insolvent.
- (3) Upon application by a corporation to have its voluntary dissolution continued under the supervision of the court.
- (4) When an action has been filed by the Attorney General to dissolve a corporation and it is established that liquidation of its affairs should precede the entry of a decree of dissolution.

(b) A court that has undertaken the liquidation of the assets and affairs of a corporation under subsection (a) of this section may at any time enter a decree dissolving the corporation, and shall upon application of any interested party enter an order directing liquidation completed.

(c) Actions under this section shall be brought in the county in which the registered office or the principal office of the corporation is situated.

(d) Summons shall issue and be served on the corporation as in other civil actions, and it shall not be necessary to make directors or members parties to any such action unless relief is sought against them personally.

(e) The superior court shall have power to liquidate the assets and affairs of a corporation in an action brought by the Attorney General under G.S. 55A-51. (1955, c. 1230.)

§ 55A-54. Procedure in liquidation of corporation by court.

In an action to liquidate the assets and affairs of a corporation, the court shall appoint receivers and the receivers so appointed shall have such powers and duties as are provided in Article 38, Chapter 1 of the General Statutes of North Carolina. (1955, c. 1230.)

§ 55A-55. Discontinuance of liquidation action.

The liquidation of the assets and affairs of a corporation may be discontinued at any time during the liquidation proceedings when it is established that cause for liquidation no longer exists. In such event the court shall dismiss the action and direct the redelivery to the corporation of all its remaining property and assets, and shall decree cancellation of any prior dissolution. (1955, c. 1230.)

§ 55A-56. Duties of officials as to decrees and orders concerning dissolution.

A court decree effecting or canceling a dissolution of a corporation or a court order declaring liquidation completed shall contain a direction to the clerk of that court promptly to file one certified copy of such decree or order with the Secretary of State and also to file a certified copy thereof with the register of deeds of the county wherein the corporation has its registered office. The fees for the preparation, certificates, and filing of such decree or order shall be taxed as a part of the costs in the action. (1955, c. 1230; 1967, c. 823, s. 23.)

§ 55A-57. Disposition of amounts due certain creditors, members, and other persons.

(a) Except as provided in subsection (b) of this section upon liquidation of a corporation, the portion of the assets distributable to a creditor or member who is unknown or cannot be found shall be reduced to cash and deposited with the clerk of the superior court of the county of the registered office of the corporation to be held three months for the persons entitled thereto, as and when satisfactory evidence of his right to the same is furnished. After the clerk has held the unclaimed cash for the aforesaid period of three months, he shall pay such assets to the Escheat Fund, to be held without liability for profit or interest until a just claim therefor shall be preferred by the parties entitled thereto.

(b) In proceedings to liquidate the assets and affairs of a corporation, any asset held by the corporation upon condition requiring return, transfer or conveyance, which condition occurs by reason of the dissolution or liquidation, shall be returned, transferred or conveyed in accordance with such requirements. If the donor or designated transferee cannot be found, then such asset shall be disposed of as provided in subsection (c) of this section.

(c) In case of assets received and held by the corporation subject to limitations permitting their use only for charitable, religious, eleemosynary, benevolent, educational or similar purposes, but not held upon a condition requiring return, transfer or conveyance by reason of the dissolution or liquidation, shall be transferred or conveyed to one or more domestic or foreign corporations, societies or organizations engaged in activities substantially similar to those of the dissolving or liquidating corporation, pursuant to a plan of distribution adopted as provided in this Chapter, or where no plan of distribution has been adopted, shall be transferred or conveyed to one or more domestic or foreign corporations, societies or organizations engaged in activities substantially similar to those of the dissolving or liquidating corporation as the court may direct. (1955, c. 1230; 1981, c. 682, s. 13.)

Effect of Amendments. — The 1981 amendment, effective July 1, 1981, substituted "Escheat Fund" for "University of North

Carolina" near the middle of the second sentence of subsection (a).

ARTICLE 8.

Foreign Corporations.

§ 55A-58. Right to conduct affairs.

(a) A foreign corporation shall procure a certificate of authority from the Secretary of State before it shall conduct affairs in this State. No foreign corporation shall be entitled to procure a certificate of authority under this Chapter to conduct in this State any affairs which a corporation organized under this Chapter is not permitted to conduct. A foreign corporation shall not be denied a certificate of authority by reason of the fact that the laws of the state or country under which such corporation is organized governing its organization and internal affairs differ from the laws of this State.

(b) Without excluding other activities which may not constitute conducting affairs in this State, a foreign corporation shall not be considered to be conducting affairs in this State, for the purpose of this Chapter by reason of carrying on in this State any one or more of the following activities:

- (1) Maintaining or defending any action or suit or any administrative or arbitration proceeding, or effecting the settlement thereof or the settlement of claims or disputes.
- (2) Holding meetings of its directors or shareholders or carrying on other activities concerning its internal affairs.
- (3) Maintaining bank accounts or borrowing money in this State, with or without security, even if such borrowings are repeated and continuous transactions.
- (4) Making or investing in loans with or without security provided no related office or agency is maintained in this State.
- (5) Taking security for or collecting debts due to it or enforcing any rights in property securing the same. (1955, c. 1230.)

§ 55A-59. Powers of foreign corporation.

(a) A foreign corporation which shall have received a certificate of authority under this Chapter shall, until a certificate of revocation or of withdrawal shall have been issued as provided in this Chapter, enjoy the same, but not greater, rights and privileges as a domestic corporation organized for the purposes set forth in the application pursuant to which such certificate of authority is issued; and, except as in this Chapter otherwise provided, shall be subject to

the same duties, restrictions, penalties, and liabilities now or hereafter imposed upon a domestic corporation of like character.

(b) A foreign corporation, however, is not eligible or entitled to qualify in this State as executor, administrator, or guardian, or as trustee under the will of any person domiciled in this State at the time of his death. (1955, c. 1230.)

§ 55A-60. Corporate name of foreign corporation.

(a) No certificate of authority shall be issued to a foreign corporation whose name contains any word or phrase which is likely to mislead the public or which indicates or implies that it is organized for any purpose other than one or more of the purposes contained in its charter.

(b) The corporate name shall not be the same as, or deceptively similar to, the name of any domestic corporation, whether for profit or not for profit, or any foreign corporation, whether for profit or not for profit, authorized to transact business or conduct affairs in this State, or a name the exclusive right to which is, at the time, reserved or registered in the manner prescribed in G.S. 55A-10, except that the Secretary of State may in his discretion issue a certificate of authority to a foreign corporation which has a corporate name the same as or similar to that of some other domestic corporation or foreign corporation authorized to transact business or conduct affairs in this State:

- (1) If the Secretary of State finds, upon proof by affidavit or otherwise, that such corporations are not engaged in the conduct of the same or similar affairs and that the public is not likely to be confused or deceived, and if, upon requirement by the Secretary of State in his discretion, such foreign corporation agrees in its application for certificate of authority to add to its corporate name in this State words indicating the state or country under the laws of which it is incorporated; or
- (2) If the foreign corporation agrees in its application for certificate of authority to conduct affairs in this State only under an assumed name that would be available for its use in this State, in which event such corporation shall thereafter comply with all of the provisions of law, including the provisions of G.S. 66-68 through 66-71, relating to doing business under an assumed name and such assumed name shall be deemed to be the name of such foreign corporation in this State and shall be entitled to the same protections under this Chapter as if it were the name of such foreign corporation.

(c) Whenever a foreign corporation which is authorized to conduct affairs in this State shall change its name to one under which a certificate of authority would not be granted to it on application therefor, the certificate of authority of such corporation shall not be deemed to permit the use in its affairs in this State of the new name nor shall any new certificate of authority be granted to it under the new name. (1955, c. 1230; 1969, c. 875, s. 7.)

§ 55A-61. Application for certificate of authority.

(a) A foreign corporation, in order to procure a certificate of authority to conduct affairs in this State, shall make application therefor to the Secretary of State, which application shall set forth:

- (1) The name of the corporation and the state or country under the laws of which it is incorporated;
- (2) If the corporation agrees under G.S. 55A-60(b) to add to its corporate name in this State words indicating its jurisdiction of incorporation or agrees to conduct affairs under an assumed name, then the name of the corporation with the words so added or the assumed name;

- (3) The date of incorporation and the period of duration of the corporation;
- (4) The address of the principal office of the corporation in the state or country under the laws of which it is incorporated;
- (5) The address, including county and city or town, and street and number, if any, of the proposed registered office of the corporation in this State, and the name of its proposed registered agent in this State at such address;
- (6) The purposes of the corporation which it proposes to pursue in conducting its affairs in this State;
- (7) The names and respective addresses of the directors and officers of the corporation;
- (8) A statement that, in consideration of the issuance of a certificate of authority to conduct affairs in this State, the corporation appoints the Secretary of State of North Carolina as its agent to receive service of process, notice, or demand whenever the corporation fails to appoint or maintain a registered agent in this State, or whenever any such registered agent cannot with reasonable diligence be found at the registered office.

(b) Such application shall be executed by the corporation by its president or a vice-president and by its secretary or an assistant secretary, and verified by one of its officers signing such application. (1955, c. 1230; 1957, c. 979, s. 14; 1969, c. 875, s. 8.)

§ 55A-62. Filing of application and certificate of authority.

(a) The application of the corporation for a certificate of authority and one conformed copy thereof shall be delivered to the Secretary of State, together with one copy of its articles of incorporation and all amendments thereto, duly authenticated by the proper officer of the state or country under the laws of which it is incorporated.

(b) If the Secretary of State finds that the application conforms to law he shall, when all taxes and fees have been tendered as in this Chapter prescribed:

- (1) Endorse on each of such documents the word "filed" and the hour, day, month, and year of the filing thereof.
- (2) File in his office the application and the copy of the articles of incorporation and amendments thereto.
- (3) Issue a certificate of authority to conduct affairs in this State to which he shall affix the conformed copy of the application.
- (4) Send to the corporation or its representative the certificate of authority, together with the conformed copy of the application affixed thereto. (1955, c. 1230.)

§ 55A-63. Effect of certificate of authority.

Upon the issuance of a certificate of authority by the Secretary of State, the corporation shall be authorized to conduct affairs in this State for those purposes set forth in its application, subject, however, to the right of this State to suspend or to revoke such authority. (1955, c. 1230.)

§ 55A-64. Registered office and registered agent of foreign corporation.

Each foreign corporation authorized to conduct affairs in this State shall establish and continuously maintain in this State:

- (1) A registered office which may be, but need not be, the same as its principal office.

- (2) A registered agent, which agent may be either an individual resident in this State whose business office is identical with such registered office, or a domestic corporation, whether for profit or not for profit, or a foreign corporation, whether for profit or not for profit, authorized to transact business or conduct affairs in this State, having an office identical with such registered office. (1955, c. 1230.)

§ 55A-65. Change of registered office or registered agent of foreign corporation.

(a) A foreign corporation authorized to conduct affairs in this State may change its registered office or change its registered agent, or both, upon filing in the office of the Secretary of State a statement setting forth:

- (1) The name of the corporation.
- (2) The address, including county and city or town, and street and number, if any, of its then registered office.
- (3) If the address of its registered office be changed, the address, including county and city or town, and street and number, if any, to which the registered office is to be changed.
- (4) The name of its then registered agent.
- (5) If its registered agent be changed, the name of its successor registered agent.
- (6) That the address of its registered office and the address of the business office of its registered agent, as changed, will be identical.

(b) Such statements shall be executed by the corporation by its president or a vice-president and by its secretary or an assistant secretary, and verified by one of its officers signing the statement.

(c) If the Secretary of State finds that such statement conforms to the provisions of this Chapter, he shall file such statement in his office, and upon such filing the change of address of the registered office, or the appointment of a new registered agent, or both, as the case may be, shall become effective. (1955, c. 1230; 1957, c. 979, ss. 15, 16.)

§ 55A-66. Suits against foreign corporations authorized to conduct affairs in this State.

(a) The registered agent appointed by a foreign corporation authorized to conduct affairs in this State shall be an agent of such corporation upon whom any process, notice, or demand required or permitted by law to be served upon the corporation may be served.

(b) Whenever a foreign corporation authorized to conduct affairs in this State shall fail to appoint or maintain a registered agent in this State, or whenever any such registered agent cannot with reasonable diligence be found at the registered office, then the Secretary of State shall be an agent of such corporation upon whom any process, notice or demand may be served.

(c) Service on any such agent may be made in a suit upon any cause of action, whether or not arising in this State or arising out of affairs conducted in this State, and whether or not the cause of action runs in favor of a resident of this State. (1955, c. 1230.)

§ 55A-67. Suits against foreign corporations conducting affairs in the State without authorization.

Whenever a foreign corporation shall conduct affairs in this State without first procuring a certificate of authority so to do from the Secretary of State or after its certificate of authority shall have been withdrawn, suspended, or

revoked, then the Secretary of State shall be an agent of such corporation upon whom any process, notice, or demand in any suit upon a cause of action arising out of such affairs may be served. (1955, c. 1230.)

§ 55A-68. Service on foreign corporation by service on Secretary of State.

Service of any process, notice or demand on a foreign corporation by service on the Secretary of State shall be made as provided in G.S. 55-146 and the provisions of that section shall apply to nonprofit corporations. (1955, c. 1230.)

§ 55A-68.1. Alternative jurisdiction over and service of process on foreign corporations.

In addition to the provisions set out in this Chapter, foreign corporations may be served with process and subjected to the jurisdiction of the courts of this State pursuant to applicable provisions of Chapter 1 and Chapter 1A of the General Statutes. (1967, c. 954, s. 3; 1973, c. 314, s. 8.)

§ 55A-69. Amendment to charter of foreign corporation.

Whenever the charter of a foreign corporation authorized to conduct affairs in this State is amended, such foreign corporation shall, within 30 days after such amendment becomes effective, file in the office of the Secretary of State a copy of such amendment duly authenticated by the proper officer of the state or country under the laws of which it is incorporated; but the filing thereof shall not of itself amend its certificate of authority. (1955, c. 1230.)

§ 55A-70. Merger of foreign corporation authorized to conduct affairs in this State.

Whenever a foreign corporation authorized to conduct affairs in this State shall be a party to a statutory merger permitted by the laws of the state or country under which it is incorporated, and such corporation shall be the surviving corporation, it shall, within 30 days after such merger becomes effective, file with the Secretary of State a copy of the articles of merger duly authenticated by the proper officer of the state or country under the laws of which such statutory merger was effected. It shall not be necessary for such corporation to procure either a new or amended certificate of authority to conduct affairs in this State unless the name of such corporation be changed thereby or unless the corporation desires to pursue in this State other or additional purposes than those which it is then authorized to pursue in this State. (1955, c. 1230.)

§ 55A-71. Amended certificate of authority.

(a) A foreign corporation authorized to conduct affairs in this State shall procure an amended certificate of authority in the event it changes its corporate name, or desires to pursue in this State other or additional purposes than those set forth in its prior application for a certificate of authority, by making application therefor to the Secretary of State.

(b) The requirements in respect to the form, the manner of its execution, the filing of the application and the conformed copy thereof, with the Secretary of State, the issuance of an amended certificate of authority and the effect thereof, shall be the same as in the case of an original application for a certificate of authority. The contents of such application need not be the same as in the case

of an original application for a certificate of authority provided the application sets forth information as to the changes proposed. (1955, c. 1230.)

§ 55A-72. Withdrawal of foreign corporation.

(a) A foreign corporation authorized to conduct affairs in this State may withdraw from this State upon procuring from the Secretary of State a certificate of withdrawal.

(b) In order to procure such certificate of withdrawal, such foreign corporation shall deliver to the Secretary of State an application for withdrawal, together with a conformed copy thereof, which shall set forth:

- (1) The name and post-office address of the principal office of the corporation and the state or country under the laws of which it is incorporated.
- (2) That the corporation is not conducting affairs in this State.
- (3) That the corporation surrenders its authority to conduct affairs in this State.
- (4) That the corporation either continues its registered agent or revokes the authority of its registered agent in this State to accept service of process and consents that service of process in any action or proceeding based upon any cause of action arising in this State, or arising out of affairs conducted in this State, during the time the corporation was authorized to conduct affairs in this State may thereafter be made on such corporation by service thereof on the Secretary of State.
- (5) If required by the Secretary of Revenue, such additional information as may be necessary or appropriate in order to determine and assess any unpaid taxes and fees payable under the laws of this State.

(c) The application for withdrawal shall be on forms prescribed by the Secretary of State and shall be executed by the corporation by its president or a vice-president and by its secretary or an assistant secretary, and verified by one of its officers signing such application, or, if the corporation is in the hands of a receiver or trustee, shall be executed on behalf of the corporation by such receiver or trustee and verified by him.

(d) If the Secretary of State finds that such application conforms to law, he shall when notified by the Secretary of Revenue that such corporation has met the requirements with respect to reports and taxes required by the revenue laws of this State:

- (1) Endorse on each of such documents the word "filed," and the hour, day, month, and year of the filing thereof.
- (2) File the application in his office.
- (3) Issue a certificate of withdrawal to which he shall affix the conformed copy.

(e) The certificate of withdrawal, together with the conformed copy of the application for withdrawal affixed thereto by the Secretary of State, shall be returned to the corporation or its representative. Upon the issuance of such certificate of withdrawal, the authority of the corporation to conduct affairs in this State shall cease. (1955, c. 1230; 1973, c. 476, s. 193.)

§ 55A-73. Revocation of certificate of authority.

(a) The certificate of authority of a foreign corporation to conduct affairs in this State may be revoked by the Secretary of State upon the conditions prescribed in this section when:

- (1) The corporation has failed for a period of 30 days to establish and maintain a registered office as required by G.S. 55A-64; or
- (2) The corporation has failed for a period of 30 days to appoint and maintain a registered agent in this State as required by G.S. 55A-64; or

- (3) The corporation has failed for a period of 30 days after change of its registered office or registered agent to file in the office of the Secretary of State a statement of such change pursuant to G.S. 55A-65; or
- (4) The corporation has failed to file in the office of the Secretary of State any amendment to its charter or any article of merger within the time prescribed by G.S. 55A-69 and 55A-70; or
- (5) A willful misrepresentation has been made of any material matter in any application, report, affidavit, or other document submitted by such corporation pursuant to this Chapter; or
- (6) The corporation has, without justification, refused to comply with a court order directing it to produce for inspection its books and records; or
- (7) The corporation is exceeding the authority conferred upon it by this Chapter.

(b) On the happening of any of the events set out in subsection (a) of this section, the Secretary of State shall give not less than 20 days' written notice to the corporation that he intends to revoke the certificate of authority of such corporation for one of said causes, specifying the same. Such notice shall be given by mail duly addressed to the corporation at its registered office in this State and at its principal office outside the State, as shown by the records in the office of the Secretary of State. If, before the expiration of the time stated in the notice, the corporation establishes to the satisfaction of the Secretary of State the fact that the stated cause for the revocation of its certificate of authority did not exist as of the time the notice was mailed or, if it did exist at said time, has been cured, then the Secretary of State shall take no further action. Otherwise, on the expiration of the time stated in the notice, he shall revoke the certificate of authority.

(c) Nothing herein shall be deemed to repeal or modify any provision of the Revenue Act relating to the suspension of the certificate of authority of foreign corporations for failure to comply with the provisions thereof. (1955, c. 1230.)

§ 55A-74. Issuance of certificate of revocation.

- (a) To revoke any such certificate of authority, the Secretary of State shall:
- (1) Issue a certificate of revocation in triplicate.
 - (2) File one of such certificates in his office.
 - (3) Mail one of such certificates to such corporation at its registered office in this State and one to the corporation at its principal office in the state or country under the laws of which it is incorporated, as shown by the records in the office of the Secretary of State.
- (b) Upon the issuance of such certificate of revocation, the authority of the corporation to conduct affairs in this State shall cease. (1955, c. 1230.)

§ 55A-75. Application of this Chapter to foreign corporations heretofore domesticated in this State.

(a) Subject to the provisions of subsection (d) of this section, foreign corporations which have been duly domesticated in this State at the time this Chapter takes effect shall be entitled to all the rights and privileges applicable to foreign corporations procuring authority to conduct affairs in this State under this Chapter, and from the time this Chapter takes effect such corporations shall be subject to all the limitations, restrictions, liabilities, and duties prescribed herein for foreign corporations procuring under this Chapter authority to conduct affairs in this State.

(b) Foreign corporations heretofore domesticated in this State which have not designated a principal office are required on and after July 1, 1957, to designate a registered office and appoint a registered agent in the manner, as near as may be, provided in G.S. 55A-65.

(c) If any foreign corporation has, prior to July 1, 1957, filed with the Secretary of State a statement designating a principal office within this State and agent in charge thereof, and has continued to maintain the same, it shall not be required to, but it may, designate a new registered office and agent in the manner, as near as may be, provided in G.S. 55A-65.

(d) If there is no office and agent registered in the office of the Secretary of State then service of process may be made on the Secretary of State, as provided in G.S. 55A-68 when there is no registered agent, until such time as a registered office is designated and a registered agent appointed.

(e) No foreign corporation which has been domesticated under the provisions of prior acts before July 1, 1957, shall hereafter have greater immunity from local jurisdiction than foreign corporations hereafter procuring a certificate of authority to conduct affairs in this State and, to this end, every such domesticated foreign corporation, by continuing as a domesticated corporation in this State, for a period of 90 days after July 1, 1957, shall be deemed to have expressly appointed the Secretary of State as its agent to receive service of process as fully as if it had made an application for a certificate of authority pursuant to the requirements of G.S. 55A-61. (1955, c. 1230; 1957, c. 979, ss. 21, 22.)

§ 55A-76. Conducting affairs without certificate of authority.

(a) No foreign corporation conducting affairs in this State without permission obtained through a certificate of authority under this Chapter or through domestication under prior acts shall be permitted to maintain any action or proceeding in any court of this State unless such corporation shall have obtained a certificate of authority prior to the trial; nor shall any action or proceeding be maintained in any court of this State by any successor or assignee of such corporation on any cause of action arising out of the conduct of affairs by such corporation in this State until:

- (1) A certificate of authority shall have been obtained by such corporation or by a foreign corporation which has acquired substantially all of its assets, or
- (2) Substantially all of its assets have been acquired by a domestic corporation or one or more individuals.

An issue arising under this subsection must be raised by motion and determined by the trial judge prior to trial.

(b) The failure of a foreign corporation to obtain a certificate of authority to conduct affairs in this State shall not impair the validity of any contract or act of such corporation, and shall not prevent such corporation from defending any action or proceeding in any court of this State.

(c) A foreign corporation failing to obtain permission to conduct affairs in this State as required by this Chapter or by prior acts then applicable shall be liable to the State for the years or parts thereof during which it conducted affairs in this State without such permission in an amount equal to all fees and taxes which would have been imposed by law upon such corporation had it duly applied for and received such permission plus interest and all penalties imposed by law for failure to pay such fees and taxes, plus five hundred dollars (\$500.00) and costs. The Attorney General shall bring actions to recover all amounts due the State under the provisions of this section.

(d) The Secretary of State is hereby directed to require that every foreign corporation conducting affairs in this State comply with the provisions of this Chapter. The Secretary of State is authorized to employ such assistants as shall be deemed necessary in his office for the purpose of enforcing the provisions of this Article and for making such investigations as shall be necessary to ascer-

tain foreign corporations now conducting affairs in this State which may have failed to comply with the provisions of this Chapter. (1955, c. 1230.)

ARTICLE 9.

Fees and Taxes.

§ 55A-77. Fees.

(a) The Secretary of State shall collect the following fees and remit them to the State Treasurer for the use of the State:

- (1) For filing articles of incorporation (G.S. 55A-7), \$5.00
- (2) For filing an application of a foreign corporation for a certificate of authority to conduct affairs in this State and issuing a certificate of authority (G.S. 55A-61), 5.00
- (3) For filing an application of a foreign corporation for an amended certificate of authority to conduct affairs in this State and issuing an amended certificate of authority (G.S. 55A-71), 5.00
- (4) For filing articles of amendment (G.S. 55A-36), 5.00
- (5) For filing a copy of an amendment to the articles of incorporation of a foreign corporation holding a certificate of authority to conduct affairs in this State (G.S. 55A-69), 5.00
- (6) For filing articles of merger or consolidation (G.S. 55A-41), 5.00
- (7) For filing a copy of articles of merger of a foreign corporation holding a certificate of authority to conduct affairs in this State (G.S. 55A-70), 5.00
- (8) For receiving any service of process as statutory agent of a corporation (G.S. 55A-13, 55A-68, 55A-75), 3.00
which amount may be recovered from the adverse party as taxable costs by the party to the action or proceeding causing such service to be made if such party prevails in the action or proceeding.
- (9) For filing a notice of resignation of a registered agent (G.S. 55A-12(d)), 1.00
- (10) For filing a statement of the change of registered office or registered agent of a domestic or foreign corporation (G.S. 55A-65, 55A-75, 55A-12), 3.00
- (11) For filing an application for withdrawal of a foreign corporation and issuing a certificate of withdrawal (G.S. 55A-72), 5.00
- (12) Issuance of a certificate of revocation of authority (G.S. 55A-74), 5.00
- (13) For filing articles of dissolution (G.S. 55A-48), 5.00
- (14) For preparing and furnishing a copy of any document, instrument or paper filed or recorded relating to a corporation (G.S. 55A-4(c)):
for the first page thereof, 1.00
for each additional page,40
for affixing his certificate and official seal thereto, 2.00
- (15) For comparing a copy furnished to him of any document, instrument or paper filed or recorded relating to a corporation:

for each page,	\$.20
for affixing his certificate and official seal thereto,	2.00
(16) For filing an application to reserve or register a corporate name and for filing an application to renew such a registration (G.S. 55A-10(e) and (f)),	5.00
(17) For filing any other document not herein specifically provided for,	5.00

(b) The filing fees hereinbefore prescribed do not include copies or certified copies and the fees for such copies are those prescribed by subdivisions (14) and (15) of subsection (a) of this section.

(c) For recording and copying any corporate document or paper required by this Chapter to be recorded in his office, the register of deeds shall collect such amounts as are prescribed by G.S. 161-10 or other applicable laws. (1957, c. 1179; 1967, c. 823, s. 24; 1969, c. 875, s. 10; 1975, 2nd Sess., c. 981, s. 2.)

§ 55A-78. Taxes.

(a) On filing articles of incorporation in the office of the Secretary of State, a tax in the amount of fifteen dollars (\$15.00) shall be collected by the Secretary of State, and remitted to the State Treasurer for the use of the State.

(b) On filing in the office of the Secretary of State an application of a foreign corporation for a certificate of authority to conduct affairs in this State, a tax in the amount of forty dollars (\$40.00) shall be collected by the Secretary of State and remitted to the State Treasurer for the use of the State. (1957, c. 1179.)

ARTICLE 10.

Miscellaneous Provisions.

§ 55A-79. Interrogatories by Secretary of State.

The Secretary of State may propound to any corporation, domestic or foreign, subject to the provisions of this Chapter, and to any officer or director thereof, such written interrogatories as may be reasonably necessary and proper to enable him to ascertain whether such corporation has complied with all the provisions of this Chapter applicable to such corporation. Such interrogatories shall be answered within 30 days after the mailing thereof, or within such additional time as shall be fixed by the Secretary of State, and the answers thereto shall be full and complete and shall be made in writing and under oath. If such interrogatories be directed to an individual they shall be answered by him, and if directed to a corporation they shall be answered by the president, vice-president, secretary or assistant secretary thereof. The Secretary of State need not file any document to which such interrogatories relate until such interrogatories be answered as herein provided, and not then if the answers thereto disclose that such document is not in conformity with the provisions of this Chapter. The Secretary of State shall certify to the Attorney General, for such action as the Attorney General may deem appropriate, all interrogatories and answers thereto which disclose a violation of any of the provisions of this Chapter, requiring or permitting action by the Attorney General. (1955, c. 1230.)

§ 55A-80. Penalties imposed upon corporations, officers and directors for failure to answer interrogatories.

(a) Each corporation, foreign or domestic, that fails or refuses to answer truthfully and fully within the time prescribed by this Chapter interrogatories propounded by the Secretary of State, in accordance with the provisions of this Chapter, shall be deemed to be guilty of a misdemeanor.

(b) Each officer and director of a corporation, domestic or foreign who fails or refuses within the time prescribed by this Chapter to answer truthfully and fully interrogatories propounded to him by the Secretary of State in accordance with the provisions of this Chapter, or who signs any articles, statement, report, application or other document filed with the Secretary of State which is known to such officer or director to be false in any material respect, shall be guilty of a misdemeanor. (1955, c. 1230.)

§ 55A-81. Powers of Secretary of State.

The Secretary of State shall have the power and authority reasonably necessary to enable him to administer this Chapter efficiently and to perform the duties therein imposed upon him. (1955, c. 1230.)

§ 55A-82. Certificates and certified copies to be received in evidence.

All certificates issued by the Secretary of State in accordance with the provisions of this Chapter, and all copies of documents filed in his office in accordance with the provisions of this Chapter when certified by him, shall be taken and received in all courts, public offices, and official bodies as prima facie evidence of the facts therein stated. (1955, c. 1230.)

§ 55A-83. Forms of documents required to be filed in office of Secretary of State.

Any document required to be filed in the office of the Secretary of State shall be made in such form, if any, as may be prescribed by the Secretary of State pursuant to the provisions of this Chapter. (1955, c. 1230.)

§ 55A-84. Photostatic copies of documents acceptable for filing or recording.

When any document is required or permitted to be filed or recorded by this Chapter, a photostatic or other photographic copy of such document may be filed or recorded in lieu of the original instrument. Such filing or recording shall have the same force and effect as if the original instrument had been so filed or recorded. (1955, c. 1230.)

§ 55A-85. Waiver of notice.

Whenever any notice is required to be given to any member or director of a corporation under the provisions of this Chapter or under the provisions of the charter or bylaws of the corporation, a waiver thereof in writing signed by the person or persons entitled to such notice, whether before or after the time stated therein, shall be equivalent to the giving of such notice. (1955, c. 1230.)

§ 55A-86: Repealed by Session Laws 1977, c. 193, s. 1.

Cross References. — For present section covering the subject matter of the repealed section, see § 55A-33.1.

§ 55A-87. Reserve power.

The General Assembly reserves the power to amend or repeal the charter of any corporation hereafter or heretofore formed and to amend or repeal this Chapter or any part thereof, the rights of any corporation or any member, director or officer in any corporation are subject to this reservation. This Chapter, including this reservation, is a part of the charter contract between members. The power so reserved includes the power to authorize charter amendments which are to be effectuated pursuant to consent by the members in the manner permitted by this Chapter, as now enacted or as subsequently amended. No amendment or repeal of this Chapter or any part thereof shall impair any liability previously incurred. (1955, c. 1230.)

§ 55A-88. Certain religious, etc., associations deemed incorporated.

In all cases where a religious, educational or charitable association has been formed prior to January 1, 1894, and has since said date been acting as a corporation, exercising the powers and performing the duties of religious, educational or charitable corporations as prescribed by the laws of this State, then such association shall be conclusively presumed to have been duly and regularly organized and existing as a corporation under the laws of this State on January 1, 1894, and all of its acts as a corporation from and after said date, if otherwise valid, are hereby declared to be valid corporate acts. (1955, c. 1230.)

CASE NOTES

Applied in *Goard v. Branscom*, 15 N.C. App. 34, 189 S.E.2d 667 (1972).

§ 55A-89. Cross references.

Whenever in this Chapter, as enacted or as hereafter amended, whether by enactment of additional provisions or otherwise, reference is made to a section of this Chapter or of any other Chapter of the statutes of this State, such reference shall, unless otherwise provided, extend to and include any amendment of the section so referred to or any section hereafter enacted in lieu of the section so referred to. (1955, c. 1230.)

ARTICLE 11.

*Curative Provisions.***§ 55A-89.1. Validation of amendments to corporate charters extending corporate existence; limitation of actions; intent.**

(a) In every case where a corporation chartered under either the general or private laws of the State of North Carolina, has continued or shall continue to act and conduct affairs as a corporation after the expiration of its period of existence as theretofore fixed in its charter and has thereafter filed in the office of the Secretary of State an amendment to its charter to extend or renew its corporate existence, such amendment is hereby validated and made effective for all intents and purposes to the same extent and with the same effect as if such amendment had been made within the period of such corporation's existence as theretofore fixed in its charter.

(b) No action or proceeding shall be brought or defense or counterclaim pleaded later than July 1, 1958, in which either the continued existence of such corporation or the validity of any of the contracts, acts, deeds, rights, privileges, powers, franchises and titles of such corporation is attacked or otherwise questioned on the grounds that such amendment was not filed within the period of such corporation's existence as theretofore fixed in its charter.

(c) In no event shall the limitation provided in subsection (b) of this section bar any action, proceeding, defense or counterclaim based upon grounds other than those mentioned in subsection (b), unless the grounds set out in subsection (b) are an essential part thereof. (1957, c. 509.)

Chapter 55B.

Professional Corporation Act.

Sec.

- 55B-1. Title.
- 55B-2. Definitions.
- 55B-3. Business Corporation Act applicable.
- 55B-4. Formation of corporation.
- 55B-5. Corporate name.
- 55B-6. Capital stock.
- 55B-7. Death or disqualification of a stockholder or employee.
- 55B-8. Rendition of professional services.
- 55B-9. Professional relationship and liability.

Sec.

- 55B-10. Registration with licensing board.
- 55B-11. Renewal of certificate of registration.
- 55B-12. Application of regulations of licensing boards.
- 55B-13. Suspension or revocation of certificate of registration.
- 55B-14. Types of professional services.
- 55B-15. Applicability of Chapter.

§ 55B-1. Title.

This Chapter may be cited as "The Professional Corporation Act." (1969, c. 718, s. 1.)

§ 55B-2. Definitions.

As used in this Chapter, the following words shall, unless the context requires otherwise, have the following meanings:

- (1) "Disqualified person" means a licensed person who for any reason becomes legally disqualified to render the same professional services which are or were being rendered by the professional corporation of which such person is an officer, director, shareholder or employee.
- (2) "Licensee" means any natural person who is duly licensed by the appropriate licensing board to render the same professional services which will be rendered by the professional corporation of which he is, or intends to become, an officer, director, shareholder or employee.
- (3) "Licensing board" means a board which is charged with the licensing and regulating of the profession or practice in this State in which the professional corporation is organized to engage.
- (4) The term "licensing board," as the same applies to attorneys at law, shall mean the Council of the North Carolina State Bar, and it shall include the North Carolina State Board of Law Examiners only to the extent that the North Carolina Board of Law Examiners is authorized to issue licenses for the practice of law under the supervision of the Council of the North Carolina State Bar.
- (5) "Professional corporation" means a corporation which is engaged in rendering the professional services as herein specified and defined, pursuant to a certificate of registration issued by the Licensing Board regulating the profession or practice, and which has as its shareholders only those individuals permitted by G.S. 55B-6 of this Chapter to be shareholders and which designates itself as may be required by this statute, and which is organized under the provisions of this Chapter and of Chapter 55, the Business Corporation Act.
- (6) The term "professional service" means any type of personal or professional service of the public which requires as a condition precedent to the rendering of such service the obtaining of a license from a licensing board as herein defined, and pursuant to the following provisions of the General Statutes: Chapter 83, "Architects"; Chapter 84, "Attorneys-at-Law"; Chapter 93, "Public Accountants"; and Article 1, "Practice of Medicine," Article 2, "Dentistry," Article 6, "Optometry," Article 7, "Osteopathy," Article 8, "Chiropractic," Article 9, "Nurse

Practice Act," with regard to registered nurses, Article 11, "Veterinaries," Article 12, "Podiatrists," of Chapter 90; Article 18A, "Practicing Psychologist," of Chapter 90; Chapter 89, "Engineering and Land Surveying"; Chapter 89A, "Landscape Architects"; and Chapter 89B, "Foresters." (1969, c. 718, s. 2; 1971, c. 196, s. 1; 1977, c. 53; c. 855, s. 1; 1979, c. 460.)

Editor's Note. — The following statutes referred to in this section have been rewritten and recodified: Chapter 83 has been recodified as Chapter 83A; Chapter 89 has been recodified

as Chapter 89C; Article 9 of Chapter 90 has been recodified as Article 9A; and Article 12 of Chapter 90 has been recodified as Article 12A.

OPINIONS OF ATTORNEY GENERAL

North Carolina Licensing Board Must License Foreign Professional. — See opinion of Attorney General to Mr. Joseph G. Maddrey,

Corporation Attorney, Office of Secretary of State, 40 N.C.A.G. 46 (1970).

§ 55B-3. Business Corporation Act applicable.

The Business Corporation Act shall be applicable to such professional corporations, including their organization, and professional corporations shall enjoy the powers and privileges and shall be subject to the duties, restrictions and liabilities of other corporations, except insofar as the same may be limited or enlarged by this Chapter. If any provision of this Chapter conflicts with the provisions of the Business Corporation Act, the provisions of this Chapter shall prevail. (1969, c. 718, s. 3.)

§ 55B-4. Formation of corporation.

A professional corporation under this Chapter may be formed pursuant to the provisions of Chapter 55, the Business Corporation Act, with the following limitations:

- (1) At least one incorporator shall be a "licensee" as hereinabove defined in G.S. 55B-2(2).
- (2) All of the shares of stock of the corporation shall be owned and held by a licensee, or licensees, as hereinabove defined in G.S. 55B-2(2). Provided, that as to professional corporations rendering services as defined in Chapters 83, 89A and 89C, limited ownership of shares by non-licensees shall be permitted as set forth in G.S. 55B-6.
- (3) At least one director and one officer shall be a "licensee" as hereinabove defined in G.S. 55B-2(2).
- (4) The articles of incorporation, in addition to the requirements of Chapter 55, shall designate the personal services to be rendered by the professional corporation and shall be accompanied by a certification by the appropriate licensing board that the ownership of the shares of stock is in compliance with the requirements of G.S. 55B-4(2) and G.S. 55B-6. (1969, c. 718, s. 4; 1977, c. 855, s. 1.)

Legal Periodicals. — For comment on tax and corporate aspects of professional

incorporation in North Carolina, see 48 N.C.L. Rev. 573 (1970).

OPINIONS OF ATTORNEY GENERAL

North Carolina Licensing Board Must License Foreign Professional. — See opinion of Attorney General to Mr. Joseph G. Maddrey,

Corporation Attorney, Office of Secretary of State, 40 N.C.A.G. 46 (1970).

§ 55B-5. Corporate name.

The corporate name used by professional corporations under this Chapter, except as limited by the licensing acts of the respective professions, shall be governed by the provisions of Chapter 55, the Business Corporation Act; provided that professional corporations may use the words "Professional Association" or "P.A." in lieu of the corporate designations specified in Chapter 55; and provided further that licensing boards by regulations may make further corporate name requirements or limitations for the respective professions, but such regulations may not prohibit the continued use of any corporate name duly adopted in conformity with the General Statutes and with the pertinent licensing board regulations in effect at the date of such adoption. (1969, c. 718, s. 5.)

§ 55B-6. Capital stock.

A professional corporation may issue shares of its capital stock only to a licensee as hereinabove defined, and such shareholders may voluntarily transfer such shares of stock issued to him only to another such licensee. No share or shares of any stock of such corporation shall be transferred upon the books of the corporation unless and until the corporation has received a certification of the appropriate licensing board that the transferee of such shares is a licensee as here defined. Provided, it shall be lawful in the case of professional corporations rendering services as defined in Chapters 83, 89A and 89C, for non-licensed employees of such corporation to own not more than one third of the total issued and outstanding shares of such corporation. Upon the transfer of any shares of such corporation to a non-licensed employee of such corporation, the corporation shall inform the appropriate licensing board of the name and address of the transferee and the number of shares issued to such nonprofessional transferee. Any share of stock of such corporation issued or transferred in violation of this section shall be null and void. No shareholder of a professional corporation shall enter into a voting trust agreement or any other type of agreement vesting in another person the authority to exercise the voting power of any or all of his stock. (1969, c. 718, s. 6; 1977, c. 855, s. 1.)

Editor's Note. — Chapter 83, referred to in this section, has been recodified as Chapter 83A.

§ 55B-7. Death or disqualification of a stockholder or employee.

(a) If any officer, shareholder, agent or employee of a corporation organized under this Chapter who is a licensee becomes legally disqualified to render professional services within this State, he shall sever all employment with, and financial interest in, such corporation forthwith. A corporation's failure to comply with this provision shall constitute grounds for the forfeiture of its certificate of incorporation and its dissolution. When a corporation's failure to comply with this provision is brought to the attention of the Secretary of State, the Secretary of State shall forthwith certify that fact to the Attorney General for appropriate action to dissolve the corporation.

(b) A professional corporation shall report to the appropriate licensing board the death of any of its shareholders within 30 days thereafter. Within one year of the date of such death, all of the shares owned by such deceased shareholder shall be transferred to and acquired by the professional corporation or persons qualified to own such shares. In the absence of an agreement which determines the equitable value of the shares, then the price for such shares shall be the fair market value of the stock, but not less than the book value as of the end of the month immediately preceding the death or disqualification. Notwithstanding any other provisions of this Chapter, the shares of stock owned by such deceased shareholder may be owned and held by the person or persons who may be legally entitled to receive such shares for a period of one year after the death of such deceased shareholder, or in the case of the death of the owner of all the shares of such corporation, for such period of time as may be necessary to liquidate the corporation. (1969, c. 718, s. 7.)

§ 55B-8. Rendition of professional services.

A professional service corporation may render professional services only through its officers, employees and agents who are duly licensed to render such professional services; provided, however, this provision shall not be interpreted to include in the term "employee," as used herein, clerks, secretaries, bookkeepers, technicians and other assistants who are not considered by law to be rendering professional services to the public. (1969, c. 718, s. 8.)

§ 55B-9. Professional relationship and liability.

Nothing in this Chapter shall be interpreted to abolish, modify, restrict, limit or alter the law in this State applicable to the professional relationship and liabilities between the person furnishing the professional services and the person receiving such professional service, or the standards of professional conduct applicable to the rendering therein of such services. (1969, c. 718, s. 9.)

CASE NOTES

Liability of Professional Corporations. — A professional corporation is liable to the same extent as if it were a partnership. Zimmerman

v. Hogg, 22 N.C. App. 544, 207 S.E.2d 267, rev'd on other grounds, 286 N.C. 24, 209 S.E.2d 795 (1974).

§ 55B-10. Registration with licensing board.

No professional corporation shall open, operate, or maintain an establishment for any of the purposes set forth in this Chapter without first having obtained a certificate of registration from the licensing board or boards. Applications for such registration shall be made to the licensing board or boards in writing and shall contain the name and address of the corporation and such other information as may be required by the licensing board or boards. If the board finds that no disciplinary action is pending before the board against any of the licensed incorporators, officers, directors, shareholders or employees of such corporation, and if it appears that such corporation will be conducted in compliance with the law and the regulations of the board, the board shall issue, upon the payment of a registration fee, not to exceed fifty dollars (\$50.00), a certificate of registration which shall remain effective until January 1 following the date of such registration or until such other expiration or renewal date as may be established by law or by the regulations of the licensing board. (1969, c. 718, s. 10.)

§ 55B-11. Renewal of certificate of registration.

Upon written application of the holder, accompanied by a fee not to exceed the sum of twenty-five dollars (\$25.00), the licensing board shall renew the certificate of registration of a professional corporation as required by law or the regulations of the licensing board if the board finds that the corporation has complied with its regulations and the provisions of this section. If the corporation does not apply for renewal of its certificate of registration within 30 days after the date of the expiration of such certificate, the certificate of registration shall be automatically suspended and may be reinstated within the calendar year upon the payment of the required renewal fee plus a penalty of ten dollars (\$10.00), if such corporation is then otherwise qualified and entitled to a renewal of its certificate of registration. (1969, c. 718, s. 11.)

§ 55B-12. Application of regulations of licensing boards.

A professional corporation shall be subject to the applicable rules and regulations adopted by, and all the disciplinary powers of, the licensing board as herein defined. Nothing in this Chapter shall impair the disciplinary powers of any licensing board applicable to a licensee as herein defined. No professional corporation may do any act which its shareholders as licensees are prohibited from doing. (1969, c. 718, s. 12.)

§ 55B-13. Suspension or revocation of certificate of registration.

A licensing board may suspend or revoke a certificate of registration issued by it to a professional corporation for any of the following reasons:

- (1) Upon the failure of such corporation to promptly remove or discharge an officer, director, shareholder or employee who becomes disqualified by reason of the revocation or suspension of his license to practice; or
- (2) Upon a finding by the licensing board that the professional corporation has failed to comply with the provisions of this Chapter or the regulations of the licensing board.

Upon the suspension or revocation of a certificate of registration issued to a professional corporation, such corporation shall cease forthwith to render professional services, and the Secretary of State shall be notified to the end that the corporation may be removed from active status and remain as such until reinstatement. (1969, c. 718, s. 13.)

§ 55B-14. Types of professional services.

A professional corporation shall render only one specific type professional service, and such services as may be ancillary thereto, and shall not engage in any other business or profession; provided, however, such corporation may own real and personal property necessary or appropriate for rendering the type of professional services it was organized to render and it may invest in real estate, mortgages, stocks, bonds, and any other type of investments; provided further, that in the case of architectural, landscape architectural, engineering or land surveying services, as defined in Chapters 83, 89, and 89A respectively, one corporation may be authorized to provide such of these services where such corporation, and at least one corporate officer who is a stockholder thereof, is duly licensed by the licensing board of each such profession. (1969, c. 718, s. 14; 1971, c. 196, s. 2; 1973, c. 1446, s. 9.)

Editor's Note. — Chapter 83, referred to in this section, has been rewritten and recodified as Chapter 83A. Chapter 89, referred to in this

section, has been rewritten and recodified as Chapter 89C.

§ 55B-15. Applicability of Chapter.

This Chapter shall not apply to any corporation which prior to June 5, 1969, was permitted by law to render professional services as herein defined; provided, however, any such corporation rendering "professional service" as defined in G.S. 55B-2(6) may be brought within the provisions of this Chapter by the filing of an amendment to its articles of incorporation declaring that its shareholders have elected to bring the corporation within the provisions of this Chapter and to make the same conform to all of the provisions of this Chapter. (1969, c. 718, s. 15.)

Chapter 55C.

Foreign Trade Zones.

Sec.

55C-1. Public corporations authorized to apply for privilege of establishing a foreign trade zone.

55C-2. "Public corporation" defined.

55C-3. Private corporations authorized to

Sec.

apply for privilege of establishing a foreign trade zone.

55C-4. Public or private corporation establishing foreign trade zone to be governed by federal law.

§ 55C-1. Public corporations authorized to apply for privilege of establishing a foreign trade zone.

Any public corporation of the State of North Carolina, as that term is hereinafter defined is hereby authorized to make application for the privilege of establishing, operating and maintaining a foreign trade zone in accordance with an act of Congress approved June 18, 1934, entitled, "An Act to Provide for the Establishment, Operation and Maintenance of Foreign Trade Zones in Ports of Entry of the United States," to expedite and encourage foreign commerce, and for other purposes. (1975, 2nd Sess., c. 983, s. 132.)

Legal Periodicals. — For survey of 1977 law on taxation, see 56 N.C.L. Rev. 1128 (1978).

§ 55C-2. "Public corporation" defined.

The term "public corporation" for the purposes of this Chapter, means the State of North Carolina or any political subdivision thereof, or any public agency of this State or any political subdivision thereof, or any public board, bureau, commission or authority created by the General Assembly. (1975, 2nd Sess., c. 983, s. 132.)

§ 55C-3. Private corporations authorized to apply for privilege of establishing a foreign trade zone.

Any private corporation hereafter organized under the laws of this State for the specific purpose of establishing, operating and maintaining a foreign trade zone in accordance with the act of Congress referred to in G.S. 55C-1 is likewise authorized to make application for the privilege of establishing, operating and maintaining a foreign trade zone in accordance with the said act of Congress. (1975, 2nd Sess., c. 983, s. 132.)

§ 55C-4. Public or private corporation establishing foreign trade zone to be governed by federal law.

Any public or private corporation authorized by this Chapter to make application for the privilege of establishing, operating, and maintaining said foreign trade zone, whose application is granted pursuant to the terms of the aforementioned act of Congress is hereby authorized to establish such foreign trade zone and to operate and maintain the same subject to the conditions and restrictions of the said act of Congress and any amendments thereto, and under such rules and regulations and for the period of time that may be prescribed by the board established by said act of Congress to carry out the provisions of such act. (1975, 2nd Sess., c. 983, s. 132; 1977, c. 782, s. 1.)

Chapter 56.**Electric, Telegraph and Power Companies.**

§§ 56-1 to 56-11: Repealed by Session Laws 1963, c. 1165, s. 1.

Chapter 57.

Hospital, Medical and Dental Service Corporations.

Article 1.

In General.

Sec.

- 57-1. Regulation and definitions; application of other laws; profit and foreign corporations prohibited.
- 57-1.1. Contract for joint assumption or underwriting of risks.
- 57-1.2. Premium or dues paid by employer, employee, principal or agent or jointly and severally.
- 57-2. Incorporation.
- 57-2.1. Members of governing boards.
- 57-3. Hospital, physician and dentist contracts.
- 57-3.1. Dentists' services.
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- 57-4. Supervision of Commissioner of Insurance; form of contract with subscribers; schedule of rates.
- 57-4.1. Public hearings on revision of existing schedule or establishment of new schedule; publication of notice.
- 57-5. Application for certificate of authority or license.
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- 57-7.2. Contracts to cover any person possessing the sickle cell trait or hemoglobin C trait.
- 57-8. Investments and reserves.
- 57-9. Reports filed with Commissioner of Insurance.
- 57-10. Visitations and examinations.
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- 57-12.1. Medical, dental and hospital service associations and agent to transact business through licensed agents only.
- 57-13. Revocation of certificate of authority; dissolution.
- 57-14. Taxation.
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- 57-16. Cost plus plans.
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- 57-18. Construction of Chapter as to single employer plans; associations exempt.
- 57-19. Merger or consolidation, proceedings for.
- 57-19.1. Merger.
- 57-20. Commissioner of Insurance determines corporations exempt from this Chapter.
- 57-21 to 57-29. [Reserved.]

Article 2.

Hospital, Medical and Dental Service Corporation Readable Insurance Certificates Act.

- 57-30. Title.
- 57-31. Purpose.
- 57-32. Scope of application.
- 57-33. Definitions.
- 57-34. Format requirements.
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- 57-36. Filing requirements; duties of the Commissioner.
- 57-37. Application to policies; dates; duties of the Commissioner.
- 57-38. Construction.

ARTICLE 1.

In General.

§ 57-1. Regulation and definitions; application of other laws; profit and foreign corporations prohibited.

Any corporation heretofore or hereafter organized under the general corporation laws of the State of North Carolina for the purpose of maintaining and operating a nonprofit hospital and/or medical and/or dental service plan whereby hospital care and/or medical and/or dental service may be provided in whole or in part by said corporation or by hospitals and/or physicians and/or dentists participating in such plan, or plans, shall be governed by this Chapter

and shall be exempt from all other provisions of the insurance laws of this State, heretofore enacted, unless specifically designated herein, and no laws hereafter enacted shall apply to them unless they be expressly designated therein.

The term "hospital service plan" as used in this Chapter includes the contracting for certain fees for, or furnishing of, hospital care, laboratory facilities, X-ray facilities, drugs, appliances, anesthesia, nursing care, operating and obstetrical equipment, accommodations and/or any and all other services authorized or permitted to be furnished by a hospital under the laws of the State of North Carolina and approved by the North Carolina Hospital Association and/or the American Medical Association.

The term "medical service plan" as used in this Chapter includes the contracting for the payment of fees toward, or furnishing of, medical, obstetrical, surgical and/or any other professional services authorized or permitted to be furnished by a duly licensed physician, except that in any plan in any policy of insurance governed by this Chapter that includes services which are within the scope of practice of a duly licensed optometrist, a duly licensed chiropractor, a duly licensed practicing psychologist, and a duly licensed physician, then the insured or beneficiary shall have the right to choose the provider of the care or service, and shall be entitled to payment of or reimbursement for such care or service, whether the provider be a duly licensed optometrist, a duly licensed chiropractor, a duly licensed practicing psychologist, or a duly licensed physician notwithstanding any provision to the contrary contained in such policy. The term "medical services plan" also includes the contracting for the payment of fees toward, or furnishing of, professional medical services authorized or permitted to be furnished by a duly licensed provider of health services licensed under Chapter 90 of the General Statutes.

For the purposes of this act, a "duly licensed practicing psychologist" shall be defined to only include a psychologist who is duly licensed or certified in the State of North Carolina and has a doctorate degree in psychology and at least two years clinical experience in a recognized health setting, or has met the standards of the National Register of Health Providers in Psychology.

The term "dental service plan" as used in this Chapter includes contracting for the payment of fees toward, or furnishing of dental and/or any other professional services authorized or permitted to be furnished by a duly licensed dentist.

The insured or beneficiary of every "medical service plan" and of every "dental service plan," as those terms are used in this Chapter, or of any policy of insurance issued thereunder, that includes services which are within the scope of practice of both a duly licensed physician and a duly licensed dentist shall have the right to choose the provider of such care or service, and shall be entitled to payment of or reimbursement for such care or service, whether the provider be a duly licensed physician or a duly licensed dentist notwithstanding any provision to the contrary contained in any such plan or policy.

The term "hospital service corporation" as used in this Chapter is intended to mean any nonprofit corporation operating a hospital and/or medical and/or dental service plan, as herein defined. Any corporation heretofore or hereafter organized and coming within the provisions of this Chapter, the certificate of incorporation of which authorizes the operation of either a hospital or medical and/or dental service plan, or any or all of them, may, with the approval of the Commissioner of Insurance, issue subscribers' contracts or certificates approved by the Commissioner of Insurance, for the payment of either hospital or medical and/or dental fees, or the furnishing of such services, or any or all of them, and may enter into contracts with hospitals for physicians and/or dentists, or any or all of them, for the furnishing of fees or services respectively

under a hospital or medical and/or dental service plan, or any or all of them.

No foreign or alien hospital or medical and/or dental service corporation as herein defined shall be authorized to do business in this State. (1941, c. 338, s. 1; 1943, c. 537, s. 1; 1953, c. 1124, s. 1; 1961, c. 1149; 1965, c. 396, s. 1; c. 1169, s. 1; 1967, c. 690, s. 1; 1973, c. 642; 1977, c. 601, ss. 1, 3½.)

Cross References. — For the Health Maintenance Organization Act of 1979, see Chapter 57B.

For provisions of Chapter 58 made applicable to hospital and medical service corporations, see notes to §§ 58-41, 58-44.6, 58-54.4, 58-250.1, 58-252, 58-257 and 58-257.1.

For provisions of Chapter 58 made applicable to medical service plan policies and hospital service plan policies issued under this Chapter, see § 58-251.3.

As to coverage to be afforded to mentally retarded and physically handicapped children, see § 58-251.3.

For the Insurance Information and Privacy Protection Act, see § 58-380 et seq.

As to authority of Commission for Health Services to regulate the sanitation of private hospitals, etc., see § 130-170.

For provisions applicable to corporations governed by this Chapter which relate to the elimination of discrimination in treatment of handicapped and disabled persons, see § 168-10.

Editor's Note. — Session Laws 1965, c. 396, s. 4, provides that nothing in the first 1965 amendment to this section, which added the exception at the end of the third paragraph, shall be construed to equate optometrists with physicians except to the extent that each must be duly licensed.

Session Laws 1965, c. 1169, s. 4, provides that the right to payment or reimbursement notwithstanding any provision contrary to the second 1965 amendment to this section, which inserted the present fifth paragraph, contained in any plan or policy shall be applicable only to those plans and policies entered into, issued, or renewed after Jan. 1, 1966, there being no legislative intent to impair or enlarge obligations under any existing contracts.

Session Laws 1967, c. 690, s. 4, provides that nothing in the 1967 amendment to this section, which added the second sentence of the third paragraph, shall be construed to equate podiatrists with physicians except to the extent that each must be duly licensed.

Session Laws 1977, c. 601, s. 3, provides that the right to payment of reimbursement notwithstanding any provision contrary to the 1977 amendment to this section, which inserted "a duly licensed practicing psychologist" in two places in the third paragraph and added the present fourth paragraph, contained in any plan or policy, shall be applicable only to those plans and policies entered into, issued, or renewed on or after October 1, 1977, there being no legislative intent to impair or enlarge obligations under any existing contracts.

Legal Periodicals. — For comment on this Chapter, see 19 N.C.L. Rev. 487.

CASE NOTES

Cited in *Cato v. Hospital Care Ass'n*, 220 N.C. 479, 17 S.E.2d 671 (1941).

§ 57-1.1. Contract for joint assumption or underwriting of risks.

Any corporation organized or regulated by the provisions of this Chapter is authorized to enter into such contracts with any other firm or corporation for joint assumption or underwriting of any part or all of any risks undertaken upon such terms and conditions as are approved by the Commissioner of Insurance. (1955, c. 894, s. 1.)

§ 57-1.2. Premium or dues paid by employer, employee, principal or agent or jointly and severally.

Any premium or dues charged by a corporation regulated under the provisions of this Chapter may be paid by the employer, employee, principal, or agent, or jointly and severally. The term "employer" as used herein includes

counties, municipal corporations, and all departments or subdivisions of the State, county, municipal corporation, and official boards including city and county boards of alcoholic control, together with all others occupying the status of employer and employee, principal and agent. (1955, c. 894, s. 2.)

§ 57-2. Incorporation.

Any number of persons not less than seven, desiring to form a nonprofit hospital service corporation, shall incorporate under the provisions of the general laws of the State of North Carolina governing corporations, but subject to the following provisions:

- (1) The certificate of incorporation of each such corporation shall have endorsed thereon or attached thereto, the consent of the Commissioner of Insurance, if he shall find the same to be in accordance with the provisions of this Chapter.
- (2) A statement of the services to be rendered by the corporation and the rates currently to be charged therefor which said statement shall be accompanied by two copies of each contract for services which the corporation proposes to make with its subscribers, and two copies of the type of contract which said corporation proposes to make with participating hospitals, shall have been furnished the Commissioner of Insurance; provided, however, that if the articles of incorporation of any such corporation within the meaning of this Chapter shall have been filed with the Secretary of State prior to March 15, 1941, the approval thereof by the Commissioner of Insurance shall be evidenced by a separate instrument in writing filed with the Secretary of State. (1941, c. 338, s. 2.)

§ 57-2.1. Members of governing boards.

(a) For the purpose of this section the words "board of directors" includes the board of directors, trustees, or other governing board.

(b) The board of directors of each hospital service corporation subject to the provisions of this Article shall include persons who are representative of its subscribers and the general public. Less than one half of the directors of any such corporation shall be persons who are licensed to practice medicine in this State or who are paid directors or employees of a corporation organized for hospital purposes. (1979, c. 538, s. 1.)

Editor's Note. — Session Laws 1979, c. 538, s. 2, provides that the act shall become effective Jan. 1, 1982.

§ 57-3. Hospital, physician and dentist contracts.

Any corporation organized under the provisions of this Chapter may enter into contracts for the rendering of hospital service to any of its subscribers by hospitals approved by the American Medical Association and/or the North Carolina Hospital Association, and may enter into contracts for the furnishing of, or the payment in whole or in part for, medical and/or dental services rendered to any of its subscribers by duly licensed physicians and/or dentists. All obligations arising under contracts issued by such corporations to its subscribers shall be satisfied by payments made directly to the hospitals or hospitals and/or physicians and/or dentists rendering such service, or direct to the subscriber or his, her, or their legal representatives upon the receipt by the corporation from the subscriber of a statement marked paid by the hospital(s) and/or physician(s) and/or dentist(s) or both rendering such service, and all

such payments heretofore made are hereby ratified. Nothing herein shall be construed to discriminate against hospitals conducted by other schools of medical practice.

On and after January 1, 1956, all certificates, plans or contracts issued to subscribers or other persons by hospital and medical and/or dental service corporations operating under Chapter 57 of the General Statutes shall contain in substance a provision as follows: "After two years from the date of issue of this certificate, contract or plan no misstatements, except fraudulent misstatements made by the applicant in the application for such certificate, contract or plan, shall be used to void said certificate, contract or plan, or to deny a claim for loss incurred or disability (as therein defined) commencing after the expiration of such two-year period. No claim for loss incurred or disability (as defined in the certificate, contract or plan) commencing after two years from the date of issue of this certificate, contract or plan shall be reduced or denied on the ground that a disease or physical condition not excluded from coverage by name or specifically described, effective on the date of loss, had existed prior to the effective date of coverage of this certificate, contract or plan." (1941, c. 338, s. 3; 1943, c. 537, s. 2; 1947, c. 820, s. 1; 1955, c. 850, s. 7; 1961, c. 1149; 1979, c. 755, s. 17.)

Cross References. — For the Readable Insurance Policies Act, see § 58-364 et seq.

Effect of Amendments. — The 1979 amendment, effective July 1, 1981, inserted "in sub-

stance" near the middle of the first sentence of the second paragraph. Session Laws 1979, c. 755, s. 20, contains a severability clause.

§ 57-3.1. Dentists' services.

Any corporation organized under the provisions of this Chapter may, in addition to its authority to contract under G.S. 57-3, enter into contracts to pay duly licensed dentists for treatment of fractures and dislocations of the jaw, and cutting procedures in the oral cavity other than extractions, repairs and care of the teeth and gums. (1957, c. 987.)

§ 57-3.2. Nurses' services.

No agency, institution or physician providing a service for which payment or reimbursement is required to be made under a contract governed by this Chapter shall be denied such payment or reimbursement on account of the fact that the service was rendered through a registered nurse acting under authority of rules and regulations adopted by the Board of Medical Examiners and the Board of Nursing pursuant to G.S. 90-6 and 90-162.

Nothing herein shall be construed to authorize contracting with or making payments directly to a nurse not otherwise permitted. (1973, c. 436.)

Editor's Note. — The article containing § 90-162, referred to in this section, has been rewritten and recodified. See now § 90-171.23.

§ 57-4. Supervision of Commissioner of Insurance; form of contract with subscribers; schedule of rates.

No hospital service corporation shall enter into any contract with subscribers unless and until it shall have filed with the Commissioner of Insurance a specimen copy of the contract or certificate and of all applications, riders, and endorsements for use in connection with the issuance or renewal thereof to be formally approved by him as conforming to the section of this Chapter entitled "Subscribers' contracts," and conforms to all rules and regulations promul-

gated by the Commissioner of Insurance under the provisions of this Chapter. The Commissioner of Insurance shall, within a reasonable time after the filing of any such form, notify the corporation filing the same either of his approval or of his disapproval of such form.

No corporation subject to the provisions of this Chapter shall enter into any contract with a subscriber after the enactment hereof unless and until it shall have filed with the Commissioner of Insurance a full schedule of rates to be paid by the subscribers to such contracts and shall have obtained the Commissioner's approval thereof. The Commissioner may refuse approval if he finds that such rates are excessive, inadequate or discriminatory or if he finds the form of subscribers' contracts is unfair or discriminatory. At all times such rates and form of subscribers' contracts shall be subject to modification and approval of the Commissioner of Insurance under rules and regulations adopted by the Commissioner, in conformity to this Chapter. (1941, c. 338, s. 4.)

§ 57-4.1. Public hearings on revision of existing schedule or establishment of new schedule; publication of notice.

Whenever any hospital service corporation licensed under this Chapter makes a rate filing or any proposal to revise an existing rate schedule or contract form, the effect of which is to increase or decrease the charge for its contracts, or to set up a new rate schedule, and such rate schedule is subject to the approval of the Commissioner, such hospital service corporation shall file its proposed rate change or contract form and supporting data with the Commissioner, who shall thereafter, before acting on any such proposal, order a public hearing thereon, if such hearing is required by the rules and regulations adopted by the Commissioner of Insurance; and then in accordance therewith fix a time and place for such hearing not earlier than 20 days thereafter. The hospital service corporation making such proposal shall, not more than 10 days prior to the time of such public hearing, cause to be published in a daily newspaper or newspapers published in North Carolina, and in accordance with the rules and regulations of the Commissioner of Insurance, a notice, in the form and content approved by the Commissioner, setting forth the nature and effect of such proposal and the time and place of the public hearing to be held. (1953, c. 1118.)

§ 57-5. Application for certificate of authority or license.

No corporation subject to the provisions of this Chapter shall issue contracts for the rendering of hospital or medical and/or dental service to subscribers, until the Commissioner of Insurance has, by formal certificate or license, authorized it to do so. Application for such certificate of authority or license shall be made on forms to be supplied by the Commissioner of Insurance, containing such information as he shall deem necessary. Each application for such certificate of authority or license, as a part thereof shall be accompanied by duplicate copies of the following documents duly certified by at least two of the executive officers of such corporation:

- (1) Certificate of incorporation with all amendments thereto.
- (2) Bylaws with all amendments thereto.
- (3) Each contract executed or proposed to be executed by and between the corporation and any participating hospital, and/or physicians under the terms of which hospital and/or medical and/or dental service is to be furnished to subscribers to the plan.

- (4) Each form of contract, application, rider, and endorsement, issued or proposed to be issued to subscribers to the plan, or in renewal of any of contracts with subscribers to the plan, together with a table of rates charged or proposed to be charged to subscribers for each form of such contract.
- (5) Financial statement of the corporation which shall include the amounts of each contribution paid or agreed to be paid to the corporation for working capital, the name or names of each contributor and the terms or each contribution. (1941, c. 338, s. 5; 1943, c. 537, s. 3; 1961, c. 1149.)

§ 57-6. Issuance of certificate.

Before issuing any such license or certificate the Commissioner of Insurance may make such an examination or investigation as he deems expedient. The Commissioner of Insurance shall issue a certificate of authority or license upon the payment of an annual fee of one hundred dollars (\$100.00) and upon being satisfied on the following points:

- (1) The applicant is established as a bona fide nonprofit hospital service corporation as defined by this Chapter.
- (2) The rates charged and benefits to be provided are fair and reasonable.
- (3) The amounts provided as working capital of the corporation are repayable only out of earned income in excess of amounts paid and payable for operating expenses and hospital and medical and/or dental expenses and such reserve as the Department of Insurance deems adequate, as provided hereinafter.
- (4) That the amount of money actually available for working capital be sufficient to carry all acquisition costs and operating expenses for a reasonable period of time from the date of the issuance of the certificate. (1941, c. 338, s. 6; 1943, c. 537, s. 4; 1947, c. 820, s. 2; 1961, c. 1149.)

§ 57-7. Subscribers' contracts; required and prohibited provisions.

(a) Every contract made by a corporation subject to the provisions of the Chapter shall be for a period not to exceed 12 months, and no contract shall be made providing for the inception of benefits at a date later than one year from the date of the contract. Any such contract may provide that it shall be automatically renewed for a similar period unless there shall have been one month's prior written notice of termination by either the subscriber or the corporation.

(b) Contracts may be issued which entitle one or more persons to benefits thereunder, provided that persons entitled to benefits thereunder, other than the certificate holder, are either spouse, lawful or legally adopted child of the certificate holder or his spouse, or other members of the immediate family of the certificate holder who reside in the same household with certificate holder and are legally, equitably, or morally dependent upon and rely upon certificate holder to a material degree for the reasonable necessities of life, such as food, clothing, lodging, maintenance, support, and/or education.

(c) Every contract entered into by any such corporation with any subscriber thereof shall be in writing and a certificate stating the terms and conditions thereof shall be furnished to the subscriber to be kept by him. No such certificate form, other than to group subscribers of groups of 10 or more certificate holders or those issued pursuant to a master group contract covering 10 or more certificate holders shall be made, issued or delivered in this State unless it contains the following provisions, provided, however, groups between five and

10 certificate holders complying with and maintaining eligibility status under regulations approved by the Commissioner of Insurance for group enrollment may be cancelled if such participation falls below the minimum participation of five certificate holders; or if the group takes other group hospital, medical or surgical coverage:

- (1) A statement of the amount payable to the corporation by the subscriber and the times at which and manner in which such amount is to be paid; this provision may be inserted in the application rather than in the certificate. Application need not be attached to certificate.
- (2) A statement of the nature of the benefits to be furnished and the period during which they will be furnished.
- (3) A statement of the terms and conditions, if any, upon which the contract may be cancelled or otherwise terminated at the option of either party. Said statement shall be in the following language:
 - a. "Renewability": Any contract subject to the provisions hereof is renewable at the option of the subscriber unless sufficient notice in writing of nonrenewal is mailed to the subscriber by the corporation addressed to the last address recorded with the corporation.
 - b. "Sufficient notice" shall be as follows:
 1. During the first year of any such contract, or during the first year following any lapse and reinstatement, or reenrollment, a period of 30 days.
 2. During the second and subsequent years of continuous coverage, a number of full calendar months most nearly equivalent to one fourth the number of months of continuous coverage from the first anniversary of the date of issue or reinstatement or reenrollment, whichever date is more recent, to the date of mailing of such notice.
 3. No period of required notice shall exceed two years, and no renewal hereunder shall renew any such contract for any period beyond the required period of notice except by written agreement of the subscriber and corporation.

Any such contract may be modified, terminated or cancelled by the corporation at any time at its option, upon:

 - a. Nonpayment of fees or dues as required, or
 - b. Failure or refusal to comply with rate or benefit changes approved by the State Insurance Department after public hearing as outlined in G.S. 57-4.1.
 - c. Failure or refusal after 30 days' written notice to subscriber to transfer into hospital and medical and/or dental service plan serving the area to which he has changed residence and is eligible for or to which corporation is required to transfer by interplan agreement of transfer.
 - d. The provisions of these amendments to subsection (c) and (c)(3) shall apply only to such contracts as are first issued on and after January 1, 1956.- (4) A statement that the contract includes the endorsement thereon and attached papers, if any, and together with the applications contains the entire contract.
- (5) A statement that if the subscriber defaults in making any payment, under the contract, the subsequent acceptance of a payment by the corporation at its home office shall reinstate the contract, but with respect to sickness and injury, only to cover such sickness as may be first manifested more than 10 days after the date of such acceptance.
- (d) In every such contract made, issued or delivered in this State:
 - (1) All printed portions shall be plainly printed;

- (2) The exceptions from the contract shall appear with the same prominence as the benefits to which they apply; and
- (3) If the contract contains any provision purporting to make any portion of the articles, constitution or bylaws of the corporation a part of the contract, such portion shall be set forth in full.
- (e) A hospital service corporation may issue a master group contract with the approval of the Commissioner of Insurance provided such contract and the individual certificates issued to members of the group, shall comply in substance to the other provisions of this Chapter. Any such contract may provide for the adjustment of the rate of the premium or benefits conferred as provided in said contract, and in accordance with an adjustment schedule filed with and approved by the Commissioner of Insurance. If such master group contract is issued, altered or modified, the subscribers' contracts issued in pursuance thereof are altered or modified accordingly, all laws and clauses in subscribers' contracts to the contrary notwithstanding. Nothing in this Chapter shall be construed to prohibit or prevent the same. Forms of such contract shall at all times be furnished upon request of subscribers thereto.
- (f) Any hospitalization contract renewed in the name of the subscriber during the grace period shall be construed to be a continuation of the contract first issued. (1941, c. 338, s. 7; 1947, c. 820, ss. 3, 4; 1955, c. 679, ss. 1-3; 1957, c. 1085, s. 1; 1961, c. 1149.)

Cross References. — As to the Hospital, Medical and Dental Service Corporation Readable Insurance Certificates Act, see §§ 57-30 through 57-38. As to contracts covering newborn infants, see § 58-251.4.

§ 57-7.1. Coverage for active medical treatment in tax-supported institutions.

(a) No hospital or medical or dental service plan, contract or certificate governed by the provisions of Chapter 57 of the General Statutes of North Carolina shall be delivered, issued, executed or renewed in this State, or approved for issuance or renewal in this State by the Commissioner of Insurance, after May 21, 1975, unless such plan, contract or certificate provides for the payment of benefits for charges made for medical care rendered in or by duly licensed state tax-supported institutions, including charges for medical care of cerebral palsy, other orthopedic and crippling disabilities, mental and nervous diseases and disorders, mental retardation, alcoholism and drug or chemical dependency, and respiratory illness, on a basis no less favorable than the basis which would apply had the medical care been rendered in or by any other public or private institution or provider. The term "state tax-supported institutions" shall include community mental health centers and other health clinics which are certified as Medicaid providers.

(b) No plan, contract, or certificate shall exclude payment for charges of a duly licensed state tax-supported institution because of its being a specialty facility for one particular type of illness nor because it does not have an operating room and related equipment for the performance of surgery, but it is not required that benefits be payable for domiciliary or custodial care, rehabilitation, training, schooling, or occupational therapy.

(c) The restrictions and requirements of this section shall not apply to any plan, contract, or certificate which is individually underwritten or provided for a specific individual and the members of his family as a nongroup policy, but shall apply only to those hospital service and medical service subscriber plans, contracts, or certificates delivered, issued for delivery, reissued or renewed in this State on and after July 1, 1975. (1975, c. 345, s. 2.)

§ 57-7.2. Contracts to cover any person possessing the sickle cell trait or hemoglobin C trait.

No hospital, medical, dental, or any health service governed by this Chapter shall refuse to issue or deliver any individual or group hospital, dental, medical, or health service contract in this State which it is currently issuing for delivery in this State, and which affords benefits or coverage for any medical treatment or service authorized or permitted to be furnished by a hospital, clinic, family health clinic, neighborhood health clinic, health maintenance organization, physician, physician's assistant, nurse practitioner or any medical service facility or personnel, on account of the fact that the person who is to be insured possesses sickle cell trait or hemoglobin C trait; nor shall any such policy issued and delivered in this State carry a higher premium rate or charge on account of the fact that the person who is to be insured possesses sickle cell trait. (1975, c. 599, s. 2.)

Editor's Note. — Session Laws 1975, c. 599, s. 3 provides that the 1975 act, which added this section, shall apply to policies of insurance delivered or issued for delivery in this State on or after July 1, 1975.

§ 57-8. Investments and reserves.

No hospital service corporation shall invest in any securities other than securities permitted by the laws of this State for the investment of assets of life insurance companies, banks, trust companies, executors, administrators and guardians.

Every such corporation after the first full year of doing business after the passage of this Chapter shall accumulate and maintain, in addition to proper reserves for current administrative liabilities and whatever reserves are deemed adequate and proper by the Commissioner of Insurance for unpaid hospital and/or medical and/or dental bills, and unearned membership dues, a special contingent surplus or reserve at the following rates annually of its gross annual collections from membership dues, exclusive of receipts from cost plus plans, until said reserve shall equal three times its average monthly expenditures for hospital and/or medical and/or dental claims and administrative and selling expenses:

- | | |
|-------------------------|----|
| (1) First \$200,000 | 4% |
| (2) Next \$200,000 | 2% |
| (3) All above \$400,000 | 1% |

Any such corporation may accumulate and maintain a contingent reserve in excess of the reserve hereinabove provided for, not to exceed an amount equal to six times the average monthly expenditures for hospital and/or medical and/or dental claims and administrative and selling expenses.

In the event the Commissioner of Insurance finds that special conditions exist warranting an increase or decrease in the reserves or schedule of reserves, hereinabove provided for, it may be modified by the Commissioner of Insurance accordingly, provided however, when special conditions exist warranting an increase in said schedule of reserves, said schedule shall not be increased by the Commissioner of Insurance until a reasonable length of time shall have elapsed after notice of such increase. (1941, c. 338, s. 8; 1943, c. 537, s. 5; 1947, c. 820, s. 5; 1961, c. 1149.)

Cross References. — As to investments by banks, see §§ 53-44, 53-45 and 53-60. As to investments by executors, administrators and guardians, see §§ 36A-1 to 36A-7.

§ 57-9. Reports filed with Commissioner of Insurance.

Every such corporation shall annually on or before the first day of March of each year, file in the office of the Commissioner of Insurance a sworn statement verified by at least two of the principal officers of the said corporation showing its condition on the thirty-first day of December, then next preceding; which shall be in such form and shall contain such matter as the Commissioner of Insurance shall prescribe. In case any such corporation shall fail to file any such annual statement as herein required, the said Commissioner of Insurance shall be authorized and empowered to suspend the certificate of authority issued to such corporation until such statement shall be properly filed. (1941, c. 338, s. 9.)

§ 57-10. Visitations and examinations.

The Commissioner of Insurance or any deputy or examiner or other person whom he may appoint shall have the power of visitations and examination into the affairs of any such corporation and free access to all the books, papers and documents that relate to the business of the corporation, and may summon and qualify witnesses under oath to examine its officers, agents, or employees or other persons in relation to the affairs, transactions and conditions of the corporation, the actual expense of which shall be paid by the association so examined. (1941, c. 338, s. 10.)

§ 57-11. Expenses.

All acquisition expenses in connection with the solicitation of subscribers to such hospital and/or medical and/or dental service plan and administration costs including salaries paid to officers of the corporations, if any, shall at all times be subject to inspection by the Commissioner of Insurance. (1941, c. 338, s. 11; 1943, c. 537, s. 6; 1961, c. 1149.)

§ 57-12. Licensing of agents.

Every agent of any hospital service corporation authorized to do business in this State under the provisions of this Chapter shall be required to obtain annually from the Commissioner of Insurance a license under the seal of his office showing that the company for which he is agent is licensed to do business in this State and that he is an agent of such company and duly authorized to do business for it. And every such agent, on demand, shall exhibit his license to any officer or to any person from whom he shall solicit hospital service. For said license, each agent shall annually pay the sum of one dollar (\$1.00). Before a license is issued to an agent, hereunder, the agent and the company for which he desires to act, shall apply for the license on forms to be prescribed by the Commissioner of Insurance, and before he issues a license to such agent, the Commissioner of Insurance shall satisfy himself by examination, or otherwise, that the person applying for a license as an agent is a person of good moral character, that he intends to hold himself out in good faith as a hospital and/or medical and/or dental service agent and has sufficient knowledge of the business proposed to be done; that he has not willfully violated any of the insurance laws of the State, and that he is a proper person for such position, and that such license, if issued, shall serve the public's interest. For said examination applicant shall pay the sum of ten dollars (\$10.00): Provided, that where an applicant has already paid the ten-dollar (\$10.00) examination fee prescribed in G.S. 105-228.7, such applicant shall not be required to pay an additional examination fee. All agents operating as such for a corporation subject to the provisions of this Chapter on the date of its ratification are deemed qualified to act as such

without the examination herein provided for. Licenses issued hereunder shall be subject to revocation by the Commissioner of Insurance for cause after notice and hearing and if any person shall assume to act as an agent or broker without obtaining the license herein provided for, or makes any false statements or representations concerning the said hospital and/or medical and/or dental service, knowingly or willfully, he shall be guilty of a misdemeanor and upon conviction shall be punished by a fine of not less than one hundred dollars (\$100.00) nor more than five hundred dollars (\$500.00) for each offense. (1941, c. 338, s. 12; 1943, c. 537, s. 7; 1947, c. 1023, s. 1; 1961, c. 1149; 1971, c. 1080, s. 2.)

§ 57-12.1. Medical, dental and hospital service associations and agent to transact business through licensed agents only.

No medical and/or dental or hospital service association; nor any agent of any association shall on behalf of such association or agent, knowingly permit any person not licensed as an agent as provided by law, to solicit, negotiate for, collect or transmit a premium for a new contract of medical and/or dental or hospital service certificate or to act in any way in the negotiation for any contract or policy; provided, no license shall be required of the following:

- (1) Persons designated by the association or subscriber to collect or deduct or transmit premiums or other charges for medical and/or dental care or hospital contracts, or to perform such acts as may be required for providing coverage for additional persons who are eligible under a master contract.
- (2) An agency office employee acting in the confines of the agent's office, under the direction and supervision of the duly licensed agent and within the scope of such agent's license, in the acceptance of request for insurance and payment of premiums, and the performance of clerical, stenographic, and similar office duties. (1955, c. 1268; 1961, c. 1149.)

§ 57-13. Revocation of certificate of authority; dissolution.

Whenever the Commissioner of Insurance shall find as a fact that any corporation subject to the provisions of this Chapter is being operated for profit or fraudulently conducted, or is not complying with the provisions of this Chapter, he shall be authorized to revoke the certificate of authority or license theretofore granted after notice and hearing, and may at any time thereafter institute or cause to be instituted the necessary proceedings under the laws of this State looking to the dissolution of such corporation, and any dissolution, liquidation, merger, or reorganization of a corporation or corporations subject to the provisions of this Chapter shall be under the supervision of the Commissioner of Insurance who shall have all powers with respect thereto granted to him under the insurance laws of this State. If, at any time, a corporation organized under the provisions of this Chapter is financially unable to comply with the provisions of this Chapter or to comply with any of the provisions of any of the hospital contracts or subscribers' contracts issued by said corporation in pursuance of this Chapter, the Commissioner of Insurance shall have the right without court action, to transfer all its assets, liabilities, and obligations, to any other corporation, whether organized under the provisions of this Chapter, or not, under such contract of reinsurance with such transferee corporation, that he deems to the best interests of the corporation, its members and creditors whose assets, obligations and liabilities, are transferred. This action on the part of the Commissioner of Insurance is without prejudice to the

rights of the corporations whose assets, liabilities and obligations are so transferred, to institute other and proper legal remedies, and to question the action so taken by the Commissioner of Insurance as herein provided, provided, however, that the action taken by the Commissioner of Insurance herein shall not be affected pending a final determination by the court with reference thereto. (1941, c. 338, s. 13; 1943, c. 537, s. 8; 1971, c. 1080, s. 3.)

§ 57-14. Taxation.

For the purpose of raising revenues sufficient to defray the expenses of the administration of this Chapter, and in lieu of all other state-levied taxes, an annual franchise or privilege tax is hereby levied upon every corporation subject to the provisions of this Chapter at the rate of one third of one percent ($\frac{1}{3}$ of 1%) of the gross annual collections from membership dues exclusive of receipts from cost plus plans. The real and personal property of such corporations is taxable under the provisions of Subchapter II of Chapter 105 of the General Statutes. (1941, c. 338, s. 14; 1965, c. 1128; 1973, c. 839.)

Legal Periodicals. — For comment on this section, see 19 N.C.L. Rev. 518.

§ 57-15. Amendments to certificate of incorporation.

Any corporation subject to the provisions of this Chapter may hereafter amend its charter in the following manner only:

- (1) a. A meeting of the board of directors, trustees or other governing authority shall be called in accordance with the bylaws specifying the amendment to be voted upon at such meeting.
- b. If at such meeting two thirds of the directors, trustees or other governing authority present vote in favor of the proposed amendment, then the president and secretary shall under oath make a certificate to this effect, which certificate shall set forth the call for such meeting, a statement showing service of such call upon all directors, and a certified copy of so much of the minutes of the meeting as relate to the adoption of the proposed amendment.
- c. Said officers shall cause said certificate to be published once a week for two consecutive weeks in a newspaper in Raleigh and in the county where the corporation's principal office is located, or posted at the courthouse door if no newspaper be published within the county. Said printed or posted notices shall be in such form and of such size as the Commissioner may approve, and in addition to setting forth in full the certificate required in paragraph b shall state that application for amending the corporation's charter in the manner specified has been proposed by the board of directors, trustees, or other governing authority, and shall also state the time set for the meeting of certificate holders thereby called to be held at the principal office of the corporation to take action on the proposed amendment. A true copy of such notice shall be filed with the Commissioner. Such publication and filing of notice shall be completed at least 30 days prior to the date set therein for the meeting of the certificate holders and due proof thereof shall be filed with the Commissioner at least 15 days prior to the date of such meeting. If the meeting at which the proposed amendment is to be considered is a special meeting, rather than a regular annual meeting of certificate holders, such special meeting can be called only after the Commissioner has given his

approval in writing, and the published notice shall show the fact of such approval. At said meeting those present in person or represented by proxy shall constitute a quorum.

- d. If at such certificate holders' meeting two thirds of those present in person or by proxy shall vote in favor of any proposed amendment, the president and secretary shall make a certificate under oath setting forth such fact together with the full text of the amendment thus approved. Said certificate shall, within 30 days after such meeting, be submitted to the Commissioner for his approval as conforming to the requirement of law, and it shall be the duty of the Commissioner to act upon all proposed amendments within 10 days after filing of such certificates with him. Should the Commissioner approve the proposed amendment or amendments, he shall certify this fact, together with the full text of such amendments as are approved by him, to the Secretary of State who shall thereupon issue the charter amendment in the usual form. Should the Commissioner disapprove of any amendment, then the same shall not be allowed.
- (2) All charters and charter amendments heretofore issued upon application of the board of directors, trustees or other governing authority of any corporations subject to the provisions of this Chapter are hereby validated.
- (3) The charter of any corporation subject to the provisions of this Chapter may be amended to convert that corporation, so amending its charter, into either a mutual nonstock or stock accident and health insurance company or life insurance company subject to the provisions of Chapter 58 of the General Statutes of North Carolina provided the rights of the subscribers or certificate holders in the reserves and capital of such corporation are adequately protected under rules and regulations adopted by the Commissioner of Insurance. (1941, c. 338, s. 15; 1947, c. 820, s. 6; 1953, c. 1124, s. 2.)

§ 57-16. Cost plus plans.

Any corporation organized under the provisions of this Chapter shall be authorized as agent of any other corporation, firm, group, partnership, or association, or any subsidiary or subsidiaries thereof, municipal corporation, State, federal government, or any agency thereof, to administer on behalf of such corporation, firm, group, partnership, or association, or any subsidiary or subsidiaries thereof, municipal corporation, State, federal government, or any agency thereof, any group hospitalization or medical and/or dental service plan, promulgated by such corporation, firm, group, partnership, or association, or any subsidiary or subsidiaries thereof, municipal corporation, State, federal government, or any agency thereof, on a cost plus administrative expense basis, provided said other corporation, firm, group, partnership, or association, or any subsidiary or subsidiaries thereof, municipal corporation, State, federal government, or any agency thereof shall have had an active existence for at least one year preceding the establishment of such plan, and was formed for purposes other than procuring such group hospitalization and/or medical and/or dental service coverage in a cost plus administrative expense basis, and provided only that administrative costs of such a cost plus plan administered by a corporation organized under the provisions of this Chapter, acting as an agent as herein provided, shall not exceed the remuneration received therefor, and provided further that the corporation organized under this Chapter administering such a plan shall have no liability to the subscribers or to the hospitals for the success or failure, liquidation or dissolution of such group hospitalization or medical and/or dental service plan and

provided further, that nothing herein contained shall be construed to require of said corporation, firm, group, partnership, or association, or any subsidiary or subsidiaries thereof, municipal corporation, State, federal government, or any agency thereof, conformity to the provisions of this Chapter if such group hospitalization is administered by a corporation organized under this Chapter, on a cost plus expense basis. The administration of any cost plus plans as herein provided shall not be subject to regulation or supervision by the Commissioner of Insurance. (1941, c. 338, s. 16; 1943, c. 537, s. 9; 1947, c. 820, s. 7; 1961, c. 1149.)

§ 57-17. Preexisting hospital service corporations.

No corporations organized under the laws of this State prior to the ratification of this Chapter, for the purposes herein provided, shall be required to reincorporate as provided for herein, and the provisions of this Chapter shall apply to said corporations only with regard to operations by said corporations with respect to subscribers' contracts, participating hospital contracts, reserves, investments, reports, visitations, expenses, taxation, amendments to charters, supervision of Commissioner of Insurance, application for certificate, issuance of certificates, licensing of agents after the date of the passage of this Chapter, provided, however, as soon as practical hereafter and in accordance with rules and regulations adopted by the Commissioner of Insurance said corporations shall conform to this Chapter as near as practical with respect to subscribers' contracts, endorsements, riders, and applications entered into prior to the ratification of this Chapter. (1941, c. 338, s. 17.)

§ 57-18. Construction of Chapter as to single employer plans; associations exempt.

Nothing in this Chapter shall be construed to affect or apply to hospital or medical and/or dental service plans which limit their membership to employees and the immediate members of the families of the employees of a single employer or his or its subsidiary or subsidiaries and which plans are operated by such employer of such limited group of the employees; nor shall this Chapter be construed to affect or apply to any nonstock, nonprofit medical service association which was, on January 1, 1943, organized solely for the purpose of, and actually engaged in, the administration of any medical service plan in this State upon contracts and participating agreements with physicians, surgeons, or medical societies, whereby such physicians or surgeons underwrite such plan by contributing their services to members of such association upon agreement with such association as to the schedule of fees to apply and the rate and method of payment by the association from the common fund paid in periodically by the members for medical, surgical and obstetrical care; and such hospital service plans, and such medical service associations as are herein specifically described, are hereby exempt from the provisions of this Chapter. The Commissioner of Insurance may require from any such hospital service plan or medical service association such information as will enable him to determine whether such hospital service plan or medical service association is exempt from the provisions of this Chapter. (1941, c. 338, s. 18; 1943, c. 537, s. 10; 1947, c. 140; 1961, c. 1149.)

§ 57-19. Merger or consolidation, proceedings for.

Any two or more hospital and/or medical and/or dental service corporations organized under and/or subject to the provisions of this Chapter as determined by the Commissioner of Insurance may, as shall be specified in the agreement hereinafter required, be merged into one of such constituent corporations,

herein designated as the surviving corporation, or may be consolidated into a new corporation to be formed by the means of such consolidation of the constituent corporations, which new corporation is herein designated as the resulting or consolidated corporation, and the directors and/or trustees, or a majority of them, of such corporations as desire to consolidate or merge, may enter into an agreement signed by them and under the corporate seals of the respective corporations, prescribing the terms and conditions of consolidation or merger, the mode of carrying the same into effect and stating such other facts as can be stated in the case of a consolidation or merger, stated in such altered form as the circumstances of the case require, and with such other details as to conversion of certificates of the subscribers as are deemed necessary and/or proper.

Said agreement shall be submitted to the certificate holders of each constituent corporation, at a separate meeting thereof, called for the purpose of taking the same into consideration; of the time, place and object of which meeting due notice shall be given by publication once a week for two consecutive weeks in some newspaper published in Raleigh, North Carolina, and in the counties in which the principal offices of the constituent corporations are located, and if no such paper is published in the county of the principal office of such constituent corporations, then said notice shall be posted at the courthouse door of said county or counties for a period of two weeks.

Said printed or posted notices shall be in such form and of such size as the Commissioner of Insurance may approve. A true copy of said notices shall be filed with the Commissioner of Insurance.

Such publication and filing of notices shall be completed at least 15 days prior to the date set therein for the meeting, and due proof thereof shall be filed with the Commissioner of Insurance at least 10 days prior to the date of such meeting.

At this meeting those present in person or represented by proxy shall constitute a quorum and said agreement shall be considered and voted upon by ballot in person or by proxy or both taken for the adoption or rejection of the same; and if the votes of two thirds of those at said meeting voting in person or by proxy shall be for the adoption of the said agreement, then that fact shall be certified on said agreement by the president and secretary of each such corporation, under the seal thereof.

The agreement so adopted and certified shall be signed by the president or vice-president and secretary or assistant secretary of each of such corporations under the corporate seals thereof and acknowledged by the president or vice-president of each such corporation before any officer authorized by the laws of this State to take acknowledgement of deeds to be the respective act, deed, and agreement of each of said corporations.

The said agreement shall be submitted to and approved by the Commissioner of Insurance, in advance of the merger or consolidation and his approval thereof shall be indicated by his signature being affixed thereto under the seal of his office.

The Commissioner shall not approve any such plans, unless, after a hearing, he finds that it is fair, equitable to certificate holders and members, consistent with law, and will not conflict with the public interest.

The agreement so certified and acknowledged with the approval of the Commissioner of Insurance noted thereon, shall be filed in the office of the Secretary of State, and shall thenceforth be taken and deemed to be the agreement and act of consolidation or merger of said corporations; and a copy of said agreement and act of consolidation or merger duly certified by the Secretary of State under the seal of his office shall also be recorded, in the office of the register of deeds of the county of this State in which the principal office of the surviving or consolidated corporation is, or is to be established, and in the office of the registers of deeds of the counties of this State in which the respective

corporations so merging or consolidating shall have their original certificates of incorporation recorded, and also in the office of the register of deeds in each county in which either or any of the corporations entering into merger or consolidation owns any real estate; and such record, or a certified copy thereof, shall be evidence of the agreement and act of consolidation or merger of said corporations, and of the observance and performance of all acts and conditions necessary to have been observed and performed precedent to such consolidation or merger. When an agreement shall have been signed, authorized, adopted, acknowledged, approved, and filed and recorded as hereinabove set forth in this section, for all purposes of the laws of this State, the separate existence of all constituent corporations, parties to said agreement, or of all such constituent corporations, except the one into which the other or others of such constituent corporations have been merged, as the case may be, shall cease and the constituent corporations shall become a new corporation, or be merged into one of such corporations, as the case may be, in accordance with the provisions of said agreement, possessing all the rights, privileges, powers and franchises as well of a public as of a private nature, of each of said constituent corporations, and all and singular, the rights, privileges, powers and franchises of each of said corporations, and all property, real, personal and mixed, and all debts due to any of said constituent corporations on whatever account, shall be vested in the corporation resulting from or surviving such consolidation or merger, and all property, rights, privileges, powers, and franchises and all and every other interest shall be thereafter as effectually the property of the resulting or surviving corporation as they were of the several and respective constituent corporations, and the title to any real estate, whether vested by deed or otherwise, under the laws of this State, vested in any such constituent corporations shall not revert or be in any way impaired by reason of such consolidation or merger; provided, however, that all rights of creditors and all liens upon the property of either of or any of said constituent corporations shall be preserved, unimpaired, limited in lien to the property affected by such lien at the time of the merger or consolidation, and all debts, liabilities, and duties of the respective constituent corporations shall thenceforth attach to said resulting or surviving corporation, and may be enforced against it to the same extent as if said debts, liabilities, and duties had been incurred or contracted by it; and further provided that notice of any said liens, debts, liabilities, and duties is given in writing to the resulting or surviving corporation within six months after the date of the filing of the agreement of merger in the office of the Secretary of State. All such liens, debts, liabilities, and duties of which notice is not given as provided herein are forever barred. The certificate of incorporation of the surviving corporation shall be deemed to be amended to the extent, if any, that the changes in its certificates of incorporation are stated in the agreement of merger. All certificates theretofore issued and outstanding by each constituent corporation in good standing upon the date of the filing of such agreement with the Secretary of State without reissuance thereof by the resulting or surviving corporation shall be the contract and agreement of the resulting or surviving corporation with each of the certificate holders thereof and subject to all terms and conditions thereof and of the agreement of merger filed in the office of the Secretary of State.

Any action or proceeding pending by or against any of the corporations consolidated or merged may be prosecuted to judgment as if such consolidation or merger had not taken place, or the corporations resulting from or surviving such consolidation or merger may be substituted in its place.

The liability of such constituent corporations to the certificate holders thereof, and the rights or remedies of the creditors thereof, or persons doing or transacting business with such corporations, shall not, in any way, be lessened or impaired by the consolidation or merger of two or more of such corporations under the provisions of this section, except as provided in this section.

When two or more corporations are consolidated or merged, the corporation resulting from or surviving such consolidation or merger shall have the power and authority to continue any contracts which any of the constituent corporations might have elected to continue. All contracts entered into between any constituent corporations and any other persons shall be and become the contract of the resulting corporations according to the terms and conditions of said contract and the agreement of consolidation or merger.

For the filing of the agreement as hereinabove provided, the Secretary of State is entitled to receive such fees only as he would have received had a new corporation been formed.

Any agreement for merger and/or consolidation as shall conform to the provisions of this section, shall be binding and valid upon all the subscribers, certificate holders and/or members of such constituent corporations, provided only that any subscriber, certificate holder and/or member who shall so indicate his disapproval thereof to the resulting, consolidated or surviving corporation within 90 days after the filing of said agreement with the Secretary of State shall be entitled to receive all unearned portions of premiums paid on his certificate from and after the date of the receipt of the application therefor by the resulting, surviving, or consolidated corporation; each subscriber, certificate holder and/or member who shall not so indicate his or her disapproval of said agreement and said merger within said period of 90 days is deemed and presumed to have approved said agreement and said merger and/or consolidation and shall have waived his or her right to question the legality of said merger and/or consolidation.

No director, officer, subscriber, certificate holder and/or member as such of any such corporation, except as is expressly provided by the plan of merger or consolidation, shall receive any fee, commission, other compensation or valuable consideration whatever, for in any manner aiding, promoting or assisting in the merger or consolidation. (1947, c. 820, s. 8; 1961, c. 1149; 1967, c. 823, s. 25.)

§ 57-19.1. Merger.

Nothing in this Chapter shall be construed to prohibit or prevent a corporation organized under, or subject to, the provisions of this Chapter from merging or consolidating with a mutual nonstock or stock accident and health insurance company or life insurance company operating under the provisions of Chapter 58 of the General Statutes of North Carolina provided the rights of the subscribers or certificate holders in the reserves and capital of such merging or consolidating corporation are adequately protected under rules and regulations adopted by the Commissioner of Insurance. The provisions of this Chapter shall be followed with reference to the adoption of such contract of merger or consolidation by the corporation operating under this Chapter and such contract, upon adoption, shall be approved and filed as herein provided. The laws of merger or consolidation applicable to the other corporation with which merger or consolidation is proposed shall be followed by such other corporation. (1953, c. 1124, s. 3.)

§ 57-20. Commissioner of Insurance determines corporations exempt from this Chapter.

The Commissioner of Insurance may require from any corporation writing any hospital service contracts and any corporation writing medical and/or dental service contracts or any or all of them, such information as will enable him to determine whether such corporation is subject to the provisions of this Chapter. (1947, c. 820, s. 9; 1961, c. 1149.)

§§ 57-21 to 57-29: Reserved for future codification purposes.

ARTICLE 2.

Hospital, Medical and Dental Service Corporation Readable Insurance Certificates Act.

§ 57-30. Title.

This Article is known and may be cited as the "Hospital, Medical and Dental Service Corporation Readable Insurance Certificates Act." (1979, 2nd Sess., c. 1161, s. 1.)

§ 57-31. Purpose.

The purpose of this Article is to provide that insurance certificates and subscriber contracts under this Chapter be readable by a person of average intelligence, experience, and education. All insurers are required by this Article to use certificate and contract forms and, where applicable, benefit booklets that are written in simple and commonly used language, that are logically and clearly arranged, and that are printed in a legible format. (1979, 2nd Sess., c. 1161, s. 1.)

§ 57-32. Scope of application.

(a) Except as provided in subsection (b) of this section, the provisions of this Article apply to the certificates and contracts of direct insurance and health care coverage that are described in G.S. 57-7(a) and (b).

(b) Nothing in this Article applies to:

- (1) Any group contract or certificate, nor any group certificate delivered or issued for delivery outside of this State;
- (2) Insurers who issue benefit booklets on group and nongroup bases explaining the certificates or contracts issued under G.S. 57-7. In such cases, the provisions of this Article apply only to the benefit booklets furnished to the persons insured, and not to the certificates.

(c) No other provision of the General Statutes setting language simplification standards shall apply to any certificate forms covered by this Article.

(d) Any non-English language certificate delivered or issued for delivery in this State shall be deemed to be in compliance with this Article if the insurer certifies that such certificate is translated from an English language certificate which does comply with this Article. (1979, 2nd Sess., c. 1161, s. 1.)

§ 57-33. Definitions.

As used in this Article, unless the context clearly indicates otherwise:

- (1) "Benefit booklet" means any written explanation of insurance coverages or benefits issued by an insurer and which is supplemental to and not a part of an insurance certificate or subscriber contract.
- (2) "Commissioner" means the Commissioner of Insurance.
- (3) "Flesch scale analysis readability score" means a measurement of the ease of readability of an insurance certificate or contract made pursuant to the procedures described in G.S. 57-35.
- (4) "Insurance certificate or contract" or "policy" or "certificate" means an agreement as defined by G.S. 57-7.
- (5) "Insurer" means every corporation providing contracts or certificates of coverage of insurance as described in G.S. 57-1. (1979, 2nd Sess., c. 1161, s. 1.)

§ 57-34. Format requirements.

(a) All certificates and contracts covered by G.S. 57-37 must be printed in a type face at least as large as 10 point modern type, one point leaded, be written in a logical and clear order and form, and contain the following items:

- (1) On the cover, first, or insert page of the certificate a statement that the certificate is a legal contract between the certificate owner and the insurer, and the statement, printed in larger or other contrasting type or color, "Read your certificate carefully";
- (2) An index of the major provisions of the certificate, which may include the following items:
 - a. The person or persons insured by the certificate;
 - b. The applicable events, occurrences, conditions, losses, or damages covered by the certificate;
 - c. The limitations or conditions on the coverage of the certificate;
 - d. Definitional sections of the certificate;
 - e. Provisions governing the procedure for filing a claim under the certificate;
 - f. Provisions governing cancellation, renewal, or amendment of the certificate by either the insurer or the subscriber;
 - g. Any options under the certificate; and
 - h. Provisions governing the insurer's duties and powers in the event that suit is filed against the subscriber.

(b) In determining whether or not a certificate is written in a logical and clear order and form the Commissioner must consider the following factors:

- (1) The extent to which sections or provisions are set off and clearly identified by titles, headings, or margin notations;
- (2) The use of a more readable format, such as narrative or outline forms;
- (3) Margin size and the amount and use of space to separate sections of the policy; and
- (4) Contrast and legibility of the colors of the ink and paper, and the use of contrasting titles or headings for sections. (1979, 2nd Sess., c. 1161, s. 1.)

§ 57-35. Flesch scale analysis readability score; procedures.

(a) A Flesch scale analysis readability score will be measured as provided in this section.

(b) For certificates containing 10,000 words or less of text, the entire certificate must be analyzed. For certificates containing more than 10,000 words, the readability of two 200-word samples per page may be analyzed in lieu of the entire certificate. The samples must be separated by at least 20 printed lines. For the purposes of this subsection a word will be counted as five printed characters or spaces between characters.

(c) The number of words and sentences in the text must be counted and the total number of words divided by the total number of sentences. The figure obtained must be multiplied by a factor of 1.015. The total number of syllables must be counted and divided by the total number of words. The figure obtained must be multiplied by a factor of 84.6. The sum of the figures computed under this subsection subtracted from 206.835 equals the Flesch scale analysis readability score for the certificate.

(d) For the purposes of subsection (c) of this section the following procedures must be used:

- (1) A contraction, hyphenated word, or numbers and letters, when separated by spaces, will be counted as one word;

- (2) A unit of words ending with a period, semicolon, or colon, but excluding headings, and captions will be counted as a sentence; and
- (3) A syllable means a unit of spoken language consisting of one or more letters of a word as divided by an accepted dictionary. Where the dictionary shows two or more equally acceptable pronunciations of a word, the pronunciation containing fewer syllables may be used.
- (e) The term "text" as used in this section includes all printed matter except the following:
 - (1) The name and address of the insurer; the name, number or title of the certificate; the table of contents or index; captions and subcaptions; specification pages, schedules or tables; and
 - (2) Any certificate language that is drafted to conform to the requirements of any law, regulation, or agency interpretation of any state or the federal government; any certificate language required by any collectively bargained agreement; any medical terminology; and any words that are defined in the certificate: Provided, however, that the insurer submits with his filing under G.S. 57-36 a certified document identifying the language or terminology that is entitled to be excepted by this subdivision. (1979, 2nd Sess., c. 1161, s. 1.)

§ 57-36. Filing requirements; duties of the Commissioner.

(a) No insurer may make, issue, amend or renew any certificate or contract after the dates specified in G.S. 57-37 for the applicable type of insurance unless the certificate is in compliance with the provisions of G.S. 57-34 and 57-35, and unless the certificate is filed with the Commissioner for his approval. The policy will be deemed approved 90 days after filing unless disapproved within the 90-day period. The Commission [Commissioner] may not unreasonably withhold his approval. Any disapproval must be delivered to the insurer in writing and must state the grounds for disapproval. Any certificate filed with the Commissioner must be accompanied by a certified Flesch scale readability analysis and test score and by the insurer's certification that the policy is, in the insurer's judgment, readable based on the factors specified in G.S. 57-34 and 57-35.

(b) The Commissioner must disapprove any certificate covered by subsection (a) of this section if he finds that:

- (1) It is not accompanied by a certified Flesch scale analysis readability score of 50 or more;
- (2) It is not accompanied by the insurer's certification that the certificate is, in the judgment of the insurer, readable under the standards of this Article; or
- (3) It does not comply with the format requirements of G.S. 57-34. (1979, 2nd Sess., c. 1161, s. 1.)

§ 57-37. Application to policies; dates; duties of the Commissioner.

(a) The filing requirements of G.S. 57-36 apply to all subscribers' contracts of hospital, medical, and dental service corporations as described in G.S. 57-7(a) and (b) that are made, issued, amended or renewed after July 1, 1983; and

(b) The Commissioner must make the following reports to the Legislative Research Commission and the General Assembly:

- (1) On or before March 31, 1980, a report detailing and evaluating the efforts made by the Commissioner and insurers to implement the provisions of subdivision (a)(1) of this section, and particularly examining the feasibility and practicality of requiring certificates to

- comply with the provisions of this Article and in the time prescribed;
- (2) On or before March 31, 1981, a report detailing and evaluating:
- a. The operation of and the extent of compliance with the provisions of this Article;
 - b. The efforts made by the Commissioner and insurers to implement the provisions of subdivision (a)(2) of this section. (1979, 2nd Sess., c. 1161, s. 1.)

Editor's Note. — The references to "subdivision (a)(1)" and "subdivision (a)(2)" in subsection (b) of this section are erroneous, since

subsection (a) of this section contains no subdivisions.

§ 57-38. Construction.

(a) The provisions of this Article will not operate to relieve any insurer from any provision of law regulating the contents or provisions of insurance certificates or contracts nor operate to reduce an insured's, beneficiary's or subscriber's rights or protection granted under any statute or provision of the law.

(b) The provisions of this Article shall not be construed to mandate, require, or allow alteration of the legal effect of any provision of any insurance certificate or contract.

(c) In any action brought by a subscriber or claimant arising out of a certificate approved pursuant to this Article, the subscriber or claimant may base such an action on either or both (i) the substantive language prescribed by such other statute or provision of law, or (ii) the wording of the approved certificate. (1979, 2nd Sess., c. 1161, s. 1.)

Chapter 57A.

Health Maintenance Organization Act.

§§ 57A-1 to 57A-29: Recodified as §§ 57B-1 to 57B-25.

Editor's Note. — This Chapter was effective July 1, 1979, and has been recodified rewritten by Session Laws 1979, c. 876, s. 1, as Chapter 57B.

Chapter 57B.

Health Maintenance Organization Act.

Sec.	Sec.
57B-1. Short title.	57B-15. Examinations.
57B-2. Definitions.	57B-16. Suspension or revocation of certificate of authority.
57B-3. Establishment of health maintenance organizations.	57B-17. Rehabilitation, liquidation, or conservation of health maintenance organization.
57B-4. Issuance of certificate.	57B-18. Regulations.
57B-5. Powers of health maintenance organizations.	57B-19. Administrative procedures.
57B-6. Reserves.	57B-20. Fees.
57B-7. Fiduciary responsibilities.	57B-21. Penalties and enforcement.
57B-8. Evidence of coverage and premiums for health care services.	57B-22. Statutory construction and relationship to other laws.
57B-9. Annual report.	57B-23. Filings and reports as public documents.
57B-10. Investments.	57B-24. Confidentiality of medical information.
57B-11. Dual choice.	57B-25. Severability.
57B-12. Prohibited practices.	
57B-13. Regulation of agents.	
57B-14. Powers of insurers and hospital and medical service corporations.	

§ 57B-1. Short title.

This Chapter may be cited as the Health Maintenance Organization Act of 1979. (1977, c. 580, s. 1; 1979, c. 876, s. 1.)

Cross References. — For the Insurance Information and Privacy Protection Act, see § 58-380 et seq.

Editor's Note. — This Chapter is Chapter 57A as rewritten by Session Laws 1979, c. 876, s. 1, effective July 1, 1979, and recodified. Where appropriate, the historical citations to the sections in former Chapter 57A have been

added to the corresponding sections in the chapter as recodified.

Legal Periodicals. — For a survey of 1977 law on health care regulation, see 56 N.C.L. Rev. 857 (1978).

For survey of 1979 administrative law, see 58 N.C.L. Rev. 1185 (1980).

§ 57B-2. Definitions.

- (a) "Commissioner" means the Commissioner of Insurance.
- (b) "Enrollee" means an individual who has been enrolled in a health care plan.
- (c) "Evidence of coverage" means any certificate, agreement, or contract issued to an enrollee setting out the coverage to which he is entitled.
- (d) "Health care plan" means any arrangement whereby any person undertakes on a prepaid basis to provide, arrange for, pay for, or reimburse any part of the cost of any health care services and at least part of such arrangement consists of arranging for or the provision of health care services, as distinguished from mere indemnification against the cost of such services on a prepaid basis through insurance or otherwise.
- (e) "Health care services" means any services included in the furnishing to any individual of medical or dental care, or hospitalization or incident to the furnishing of such care of [or] hospitalization, as well as the furnishing to any person of any and all other services for the purpose of preventing, alleviating, curing, or healing human illness or injury.
- (f) "Health maintenance organization" means any person who undertakes to provide or arrange for one or more health care plans.

(g) "Person" includes associations, trusts, or corporations, but does not include professional associations, or individuals.

(h) "Provider" means any physician, hospital, or other person that is licensed or otherwise authorized in this State to furnish health care services. (1977, c. 580, s. 1; 1979, c. 876, s. 1.)

Legal Periodicals. — For survey of 1979 administrative law, see 58 N.C.L. Rev. 1185 (1980).

§ 57B-3. Establishment of health maintenance organizations.

(a) Notwithstanding any law of this State to the contrary, any person may apply to the Commissioner for and obtain a certificate of authority to establish and operate a health maintenance organization in compliance with this Chapter. No person shall establish or operate a health maintenance organization in this State, nor sell or offer to sell, or solicit offers to purchase or receive advance or periodic consideration in conjunction with a health maintenance organization without obtaining a certificate of authority under this Chapter. A foreign corporation may qualify under this Chapter, subject to its registration to do business in this State as a foreign corporation under Article 17 of Chapter 58.

- (b) (1) It is specifically the intention of this section to permit such persons as were providing health services on a prepaid basis on July 1, 1977, or receiving federal funds under Section 254(c) of Title 42, U.S. Code, as a community health center, [to] continue to operate in the manner which they have heretofore operated.
- (2) Notwithstanding anything contained in this Chapter to the contrary, any person can provide health services on a fee for service basis to individuals who are not enrollees of the organization, and to enrollees for services not covered by the contract, provided that the volume of services in this manner shall not be such as to affect the ability of the health maintenance organization to provide on an adequate and timely basis those services to its enrolled members which it has contracted to furnish under the enrollment contract.
- (3) This Chapter shall not apply to any employee benefit plan to the extent that the Federal Employee Retirement Income Security Act of 1974 preempts State regulation thereof.
- (4) Except as provided in paragraphs (1), (2), and (3) of this subsection, the persons to whom these paragraphs are applicable shall be required to comply with all provisions contained in this Chapter.

(c) Each application for a certificate of authority shall be verified by an officer or authorized representative of the applicant, shall be in a form prescribed by the Commissioner, and shall be set forth or be accompanied by the following:

- (1) A copy of the basic organizational document, if any, of the applicant such as the articles of incorporation, articles of association, partnership agreement, trust agreement, or other applicable documents, and all amendments thereto;
- (2) A copy of the bylaws, rules and regulations, or similar document, if any, regulating the conduct of the internal affairs of the applicant;
- (3) A list of the names, addresses, and official positions of persons who are to be responsible for the conduct of the affairs of the applicant, including all members of the board of directors, board of trustees, executive committee, or other governing board or committee, the principal officers in the case of a corporation, and the partners or members in the case of a partnership or association;

- (4) A copy of any contract made or to be made between any providers or persons listed in paragraph (3) and the applicant;
 - (5) A statement generally describing the health maintenance organization, its health care plan or plans, facilities, and personnel;
 - (6) A copy of the form of evidence of coverage to be issued to the enrollees;
 - (7) A copy of the form of the group contract, if any, which is to be issued to employers, unions, trustees, or other organizations;
 - (8) Financial statements showing the applicant's assets, liabilities, and sources of financial support. If the applicant's financial affairs are audited by independent certified public accountants, a copy of the applicant's most recent regular certified financial statement shall be deemed to satisfy this requirement unless the Commissioner directs that additional or more recent financial information is required for the proper administration of this Chapter;
 - (9) A description of the proposed method of marketing the plan, a financial plan which includes a three-year projection of the initial operating results anticipated, and a statement as to the sources of working capital as well as any other sources of funding;
 - (10) A power of attorney duly executed by such applicant, if not domiciled in this State, appointing the Commissioner and his successors in office, and duly authorized deputies, as the true and lawful attorney of such applicant in and for this State upon whom all lawful process in any legal action or proceeding against the health maintenance organization on a cause of action arising in this State may be served;
 - (11) A statement reasonably describing the geographic area or areas to be served;
 - (12) Such other information as the Commissioner may require to make the determinations required in G.S. 57B-4.
- (d) (1) A health maintenance organization shall, unless otherwise provided for in this Chapter, file a notice describing any modification of the operation set out in the information required by subsection (c). Such notice shall be filed with the Commissioner prior to the modification. If the Commissioner does not disapprove within 30 days of filing, such modification shall be deemed approved.
- (2) The Commissioner may promulgate rules and regulations exempting from the filing requirements of subdivision (1) those items he deems unnecessary. (1977, c. 580, s. 1; 1979, c. 876, s. 1.)

Cross References. — As to when health maintenance organizations are subject to review and required to obtain certificates under the Certificate of Need Law, see § 131-178.

Legal Periodicals. — For survey of 1979 administrative law, see 58 N.C.L. Rev. 1185 (1980).

§ 57B-4. Issuance of certificate.

(a) Before issuing any such certificate, the Commissioner of Insurance may make such an examination or investigation as he deems expedient. The Commissioner of Insurance shall issue a certificate of authority upon the payment of the application fee prescribed in G.S. 57B-20 and upon being satisfied on the following points:

- (1) The applicant is established as a bona fide health maintenance organization as defined by this Chapter;
- (2) The rates charged and benefits to be provided are fair and reasonable;
- (3) The amounts provided as working capital are repayable only out of earned income in excess of amounts paid and payable for operating expenses and expenses of providing services and such reserve as the Department of Insurance deems adequate, as provided hereinafter;

- (4) That the amount of money actually available for working capital be sufficient to carry all acquisition costs and operating expenses for a reasonable period of time from the date of the issuance of the certificate and that the health maintenance organization is financially responsible and may reasonably be expected to meet its obligations to enrollees and prospective enrollees.
- (b) In making the determinations required under this section, the Commissioner may consider:
 - (1) The financial soundness of the health care plan's arrangements for health care services and the schedule of premiums used in connection therewith;
 - (2) The adequacy of working capital;
 - (3) Any agreement with an insurer, a hospital or medical service corporation, a government, or any other organization for insuring the payment of the cost of health care services or the provision for automatic applicability of alternative coverage in the event of discontinuance of the plan;
 - (4) Any agreement with providers for the provision of health care services; and
 - (5) Any firm commitment of federal funds to the health maintenance organization in the form of a grant, even though such funds have not been paid to the health maintenance organization, provided that the health maintenance organization certifies to the Commissioner that such funds have been committed, that such funds are to be paid to the health maintenance organization with a current fiscal year and that such funds may be used directly for operating purposes and for the benefit of enrollees of the health maintenance organization.
- (c) A certificate of authority shall be denied only after compliance with the requirements of G.S. 57B-19. (1977, c. 580, s. 1; 1979, c. 876, s. 1.)

§ 57B-5. Powers of health maintenance organizations.

- (a) The powers of a health maintenance organization include, but are not limited to the following:
 - (1) The purchase, lease, construction, renovation, operation, or maintenance of hospitals, medical facilities, or both, and their ancillary equipment, and such property as may reasonably be required for its principal office or for such other purposes as may be necessary in the transaction of the business of the organization;
 - (2) The making of loans to a medical group under contract with it in furtherance of its program or the making of loans to a corporation or corporations under its control for the purpose of acquiring or constructing medical facilities and hospitals or in furtherance of a program providing health care services to enrollees;
 - (3) The furnishing of health care services through providers which are under contract with or employed by the health maintenance organization;
 - (4) The contracting with any person for the performance on its behalf of certain functions such as marketing, enrollment and administration;
 - (5) The contracting with an insurance company licensed in this State, or with a hospital or medical service corporation authorized to do business in this State, for the provision of insurance, indemnity, or reimbursement against the cost of health care services provided by the health maintenance organization;
 - (6) The offering and contracting for the provision or arranging of, in addition to health care services, of:

- a. Additional health care services;
 - b. Indemnity benefits, covering out-of-area or emergency services; and
 - c. Indemnity benefits, in addition to those relating to out-of-area and emergency services, provided through insurers or hospital or medical service corporations.
- (b) (1) A health maintenance organization shall file notice, with adequate supporting information, with the Commissioner prior to the exercise of any power granted in subsections (a)(1) or (2). The Commissioner shall disapprove such exercise of power if in his opinion it would substantially and adversely affect the financial soundness of the health maintenance organization and endanger its ability to meet its obligations. If the Commissioner does not disapprove within 30 days of the filing, it shall be deemed approved.
- (2) The Commissioner may promulgate rules and regulations exempting from the filing requirement of subdivision (1) those activities having a de minimis effect. (1977, c. 580, s. 1; 1979, c. 876, s. 1.)

§ 57B-6. Reserves.

Every health maintenance organization after the first full year of doing business after the passage of this section shall accumulate and maintain, in addition to proper reserves for current administrative liabilities and whatever reserves are deemed adequate and proper by the Commissioner of Insurance for unpaid bills, and unearned membership dues, a special contingent surplus or reserve at the following rates annually of its gross annual collections from membership dues, until said reserve shall equal three times its average monthly expenditures:

(1) First \$200,000	4%
(2) Next \$200,000	2%
(3) All above \$400,000	1%

Any such health maintenance organization may accumulate and maintain a contingent reserve in excess of the reserve hereinabove provided for, not to exceed an amount equal to six times the average monthly expenditures.

In the event the Commissioner of Insurance finds that special conditions exist warranting a decrease in the reserves or schedule of reserves, hereinabove provided for, it may be modified by the Commissioner of Insurance accordingly. (1979, c. 876, s. 1.)

Legal Periodicals. — For survey of 1979 administrative law, see 58 N.C.L. Rev. 1185 (1980).

§ 57B-7. Fiduciary responsibilities.

Any director, officer or partner of a health maintenance organization who receives, collects, disburses, or invests funds in connection with the activities of such organization shall be responsible for such funds in a fiduciary relationship to the enrollees. (1977, c. 580, s. 1; 1979, c. 876, s. 1.)

§ 57B-8. Evidence of coverage and premiums for health care services.

- (a) (1) Every enrollee residing in this State is entitled to evidence of coverage under a health care plan. If the enrollee obtains coverage under a health care plan through an insurance policy or a contract

issued by a hospital or medical service corporation, whether by option or otherwise, the insurer or the hospital or medical service corporation shall issue the evidence of coverage. Otherwise, the health maintenance organization shall issue the evidence of coverage.

- (2) No evidence of coverage, or amendment thereto, shall be issued or delivered to any person in this State until a copy of the form of the evidence of coverage, or amendment thereto, has been filed with and approved by the Commissioner.

- (3) An evidence of coverage shall contain:

- a. No provisions or statements which are unjust, unfair, inequitable, misleading, deceptive, which encourage misrepresentation, or which are untrue, misleading or deceptive as defined in G.S. 57B-12(a); and
- b. A clear and complete statement, if a contract, or a reasonably complete summary, if a certificate of:
 1. The health care services and insurance or other benefits, if any, to which the enrollee is entitled under the health care plan;
 2. Any limitations on the services, benefits, or kind of benefits, to be provided, including any deductible or copayment feature;
 3. Where and in what manner information is available as to how services may be obtained;
 4. The total amount of payment for health care services and the indemnity or service benefits, if any, which the enrollee is obligated to pay with respect to individual contracts, or an indication whether the plan is contributory or noncontributory with respect to group certificates;
 5. A clear and understandable description of the health maintenance organization's method of resolving enrollee complaints.

Any subsequent change may be evidenced in a separate document issued to the enrollee.

- (4) A copy of the form of the evidence of coverage to be used in this State, and any amendment thereto, shall be subject to the filing and approval requirements of subsection (b) unless it is subject to the jurisdiction of the Commissioner under the laws governing health insurance or hospital or medical service corporations in which event the filing and approval provisions of such laws shall apply. To the extent, however, that such provisions do not apply the requirements in subsection (c) shall be applicable.

- (b) (1) No schedule of premiums for enrollee coverage for health care services, or amendment thereto, may be used in conjunction with any health care plan until a copy of such schedule, or amendment thereto, has been filed with and approved by the Commissioner.

- (2) Such premiums may be established in accordance with actuarial principles for various categories of enrollees, provided that premiums applicable to an enrollee shall not be individually determined based on the status of his health. However, the premiums shall not be excessive, inadequate, or unfairly discriminatory.

(c) The Commissioner shall, within a reasonable period, approve any form if the requirements of paragraph (1) are met and any schedule of premiums if the requirements of paragraph (2) are met. It shall be unlawful to issue such form or to use such schedule of premiums until approved. If the Commissioner disapproves such filing, he shall notify the filer. In the notice, the Commissioner shall specify the reasons for his disapproval. A hearing will be granted within 30 days after a request in writing by the person filing. If the Commissioner does not approve or disapprove any form or schedule of premiums within

30 days of the filing of such forms or premiums, they shall be deemed approved.

(d) The Commissioner may require the submission of whatever relevant information he deems necessary in determining whether to approve or disapprove a filing made pursuant to this section. (1977, c. 580, s. 1; 1979, c. 876, s. 1.)

Cross References. — For the Readable Insurance Policies Act, see § 58-364 et seq.

Editor's Note. — Session Laws 1979, c. 755, s. 18, effective July 1, 1981, amends § 57A-8 in Chapter 57A before the revision of that chapter by Session Laws 1979, c. 876, s. 1, and recodification as Chapter 57B. The amendment

substitutes "90 days" for "30 days" in the last sentence.

Effect of Amendments. — Session Laws 1979, c. 755, s. 18, effective July 1, 1981, substituted "90 days" for "30 days" in the last sentence of subsection (c).

§ 57B-9. Annual report.

Every such health maintenance organization shall annually on or before the first day of March of each year, file in the office of the Commissioner of Insurance a sworn statement verified by at least two of the principal officers of the health maintenance organization showing its condition on the thirty-first day of December, then next preceding; which shall be in such form as the Commissioner of Insurance shall prescribe. In case any such health maintenance organization shall fail to file any such annual statement as herein required, the said Commissioner of Insurance shall be authorized and empowered to suspend the certificate of authority issued to such health maintenance organization until such statement shall be properly filed. (1977, c. 580, s. 1; 1979, c. 876, s. 1.)

§ 57B-10. Investments.

With the exception of investments made in accordance with G.S. 57B-5(a)(1) and (2) and G.S. 57B-5(b), the investable funds of a health maintenance organization shall be invested only in securities or other investments permitted by the laws of this State for the investment of assets constituting the legal reserves of life insurance companies or such other securities or investments as the Commissioner may permit. (1977, c. 580, s. 1; 1979, c. 876, s. 1.)

§ 57B-11. Dual choice.

(a) The State government, or any agency, board, commission, institution, or political subdivision thereof, and any city or county, or board of education, which offers its employees a health benefits plan may make available to and inform its employees or members of the option to enroll in at least one health maintenance organization holding a valid certificate of authority which provides health care services in the geographic areas in which such employees or members reside.

(b) The first time a prepaid health plan is offered, each covered employee must make an affirmative choice between the two or more plans. Thereafter, those who wish to change from one plan to another will be allowed to do so annually.

(c) This section shall impose no responsibilities or duties upon State government or any agency, board, commission, institution or political subdivision thereof or any other employer, either public or private to offer health maintenance organization coverage when no health maintenance organization exists for the purpose of providing health care services in the geographic areas in which the employees or members reside.

(d) No employer in this State shall in any way be required to pay more for health benefits as a result of the application of this section than would otherwise be required by any prevailing collective bargaining agreement or other legally enforceable contract of obligation for the provision of health benefits between such employer and its employees, or in any plan provided voluntarily by an employer.

(e) In the event of election to become subscribers of the health maintenance organization plan or to return to the alternative plan, this shall be done without any penalty as to waiting period, pre-existing conditions provisions, or any other provisions which would otherwise effect the credit for the period. (1979, c. 876, s. 1.)

Legal Periodicals. — For survey of 1979 administrative law, see 58 N.C.L. Rev. 1185 (1980).

§ 57B-12. Prohibited practices.

(a) No health maintenance organization, or representative thereof, may cause or knowingly permit the use of advertising which is untrue or misleading, solicitation which is untrue or misleading, or any form of evidence of coverage which is deceptive. For purposes of this Chapter:

- (1) A statement or item of information shall be deemed to be untrue if it does not conform to fact in any respect which is or may be significant to an enrollee of, or person considering enrollment in, a health care plan.
- (2) A statement or item of information shall be deemed to be misleading, whether or not it may be literally untrue, if, in the total context in which such statement is made or such item of information is communicated, such statement or item of information may be reasonably understood by a reasonable person, not possessing special knowledge regarding health care coverage, as indicating any benefit or advantage or the absence of any exclusion, limitation, or disadvantage of possible significance to an enrollee of, or person considering enrollment in a health care plan, if such benefit or advantage or absence of limitation, exclusion or disadvantage does not in fact exist.
- (3) An evidence of coverage shall be deemed to be deceptive if the evidence of coverage taken as a whole, and with consideration given to typography and format, as well as language, shall be such as to cause a reasonable person, not possessing special knowledge regarding health care plans and evidences of coverage therefor, to expect benefits, services, premiums, or other advantages which the evidence of coverage does not provide or which the health care plan issuing such evidence of coverage does not regularly make available for enrollees covered under such evidence of coverage.

(b) The provisions of Article 3A of Chapter 58 of the General Statutes shall be construed to apply to health maintenance organizations, health care plans and evidences of coverage except to the extent that the Commissioner determines that the nature of health maintenance organizations, health care plans and evidences of coverage render such sections clearly inappropriate.

(c) An enrollee may not be cancelled or not renewed because of any deterioration in the health of the enrollee.

(d) No health maintenance organization, unless licensed as an insurer, may use in its name, contracts, or literature any of the words "insurance", "casualty", "surety", "mutual", or any other words descriptive of the insurance, casualty, or surety business or deceptively similar to the name or description of any insurance or surety corporation doing business in this State.

(e) The HMO shall not refuse to enroll employees except when they can demonstrate they are unable to arrange adequate services. (1977, c. 580, s. 1; 1979, c. 876, s. 1.)

Legal Periodicals. — For survey of 1979 administrative law, see 58 N.C.L. Rev. 1185 (1980).

§ 57B-13. Regulation of agents.

The Commissioner may, after notice and hearing, promulgate such reasonable rules and regulations as are necessary to provide for the licensing of agents. (1977, c. 580, s. 1; 1979, c. 876, s. 1.)

§ 57B-14. Powers of insurers and hospital and medical service corporations.

(a) An insurance company licensed in this State, or a hospital or medical service corporation authorized to do business in this State, may either directly or through a subsidiary or affiliate organize and operate a health maintenance organization under the provisions of this Chapter. Notwithstanding any other law which may be inconsistent herewith, any two or more such insurance companies, hospital or medical service corporations, or subsidiaries or affiliates thereof, may jointly organize and operate a health maintenance organization. The business of insurance is deemed to include the arranging of health care by a health maintenance organization owned or operated by an insurer or a subsidiary thereof.

(b) Notwithstanding any provision of the insurance and hospital or medical service corporation laws contained in Chapters 57 and 58 of the General Statutes, an insurer or a hospital or medical service corporation may contract with a health maintenance organization to provide insurance or similar protection against the cost of care provided through health maintenance organizations and to provide coverage in the event of the failure of the health maintenance organization to meet its obligations. The enrollees of a health maintenance organization constitute a permissible group under such laws. Among other things, under such contracts, the insurer or hospital or medical service corporation may make benefit payments to health maintenance organizations for health care services rendered by providers pursuant to the health care plan. (1977, c. 580, s. 1; 1979, c. 876, s. 1.)

§ 57B-15. Examinations.

(a) The Commissioner may make an examination of the affairs of any health maintenance organization and the contracts, agreements or other arrangements pursuant to its health care plan as often as he deems it necessary for the protection of the interests of the people of this State but not less frequently than once every three years.

(b) Every health maintenance organization shall submit its books and records relating to the health care plan to such examinations and in every way facilitate them. For the purpose of examinations, the Commissioner may administer oaths to, and examine the officers and agents of the health maintenance organization concerning their business.

(c) The expenses of examinations under this section shall be assessed against the organization being examined and remitted to the Commissioner for whom the examination is being conducted.

(d) In lieu of such examination, the Commissioner may accept the report of an examination made by the Commissioner of Insurance or Commissioner of Public Health of another state. (1977, c. 580, s. 1; 1979, c. 876, s. 1.)

§ 57B-16. Suspension or revocation of certificate of authority.

(a) The Commissioner may suspend or revoke any certificate of authority issued to a health maintenance organization under this Chapter if he finds that any of the following conditions exist:

- (1) The health maintenance organization is operating significantly in contravention of its basic organizational document, or in a manner contrary to that described in and reasonably inferred from any other information submitted under G.S. 57B-3, unless amendments to such submissions have been filed with and approved by the Commissioner.
- (2) The health maintenance organization issues evidence of coverage or uses a schedule of premiums for health care services which do not comply with the requirements of G.S. 57B-8.
- (3) The health maintenance organization no longer maintains the financial reserve specified in G.S. 57B-6 or is no longer financially responsible and may reasonably be expected to be unable to meet its obligations to enrollees or prospective enrollees.
- (4) The health maintenance organization, or any person on its behalf, has advertised or merchandised its services in an untrue, misrepresentative, misleading, deceptive or unfair manner.
- (5) The continued operation of the health maintenance organization would be hazardous to its enrollees.
- (6) The health maintenance organization has otherwise failed to substantially comply with this Chapter.

(b) A certificate of authority shall be suspended or revoked only after compliance with the requirements of G.S. 57B-19.

(c) When the certificate of authority of a health maintenance organization is suspended, the health maintenance organization shall not, during the period of such suspension, enroll any additional enrollees except newborn children or other newly acquired dependents of existing enrollees, and shall not engage in any advertising or solicitation whatsoever.

(d) When the certificate of authority of a health maintenance organization is revoked, such organization shall proceed, immediately following the effective date of the order of revocation, to wind up its affairs, and shall conduct no further business except as may be essential to the orderly conclusion of the affairs of such organization. It shall engage in no advertising or solicitation whatsoever. The Commissioner may, by written order, permit such further operation of the organization as he may find to be in the best interest of enrollees, to the end that enrollees will be afforded the greatest practical opportunity to obtain continuing health care coverage. (1977, c. 580, s. 1; 1979, c. 876, s. 1.)

§ 57B-17. Rehabilitation, liquidation, or conservation of health maintenance organization.

Any rehabilitation, liquidation or conservation of a health maintenance organization shall be deemed to be the rehabilitation, liquidation, or conservation of an insurance company and shall be conducted under the supervision of the Commissioner pursuant to the law governing the rehabilitation, liquidation, or conservation of insurance companies, except that the provisions of Articles 17B and 17C of Chapter 58 of the General Statutes shall not apply to

health maintenance organizations. The Commissioner may apply for an order directing him to rehabilitate, liquidate, or conserve a health maintenance organization upon one or more grounds set out in Article 17A of Chapter 58 of the General Statutes or when in his opinion the continued operation of the health maintenance organization would be hazardous either to the enrollees or to the people of this State. (1977, c. 580, s. 1; 1979, c. 876, s. 1.)

§ 57B-18. Regulations.

The Commissioner may, after notice and hearing, promulgate reasonable rules and regulations as are necessary or proper to carry out the provisions of this Chapter. Such rules and regulations shall be subject to review in accordance with G.S. 57B-19. (1977, c. 580, s. 1; 1979, c. 876, s. 1.)

§ 57B-19. Administrative procedures.

(a) When the Commissioner has cause to believe that grounds for the denial of an application for a certificate of authority exist, or that grounds for the suspension or revocation of a certificate of authority exist, he shall notify the health maintenance organization in writing specifically stating the grounds for denial, suspension, or revocation and fixing a time of at least 30 days thereafter for a hearing on the matter.

(b) After such hearing, or upon the failure of the health maintenance organization to appear at such hearing, the Commissioner shall take action as is deemed advisable or written findings which shall be mailed to the health maintenance organization. The action of the Commissioner shall be subject to review by the Superior Court of Wake County. The court may, in disposing of the issue before it, modify, affirm, or reverse the order of the Commissioner in whole or in part.

(c) The provisions of Chapter 150A of the General Statutes of this State shall apply to proceedings under this section to the extent that they are not in conflict with subsections (a) and (b). (1977, c. 580, s. 1; 1979, c. 876, s. 1.)

§ 57B-20. Fees.

Every health maintenance organization subject to this Chapter shall pay to the Commissioner the following fees:

- (1) For filing an application for a certificate of authority or amendment thereto, twenty dollars (\$20.00);
- (2) For filing each annual report, ten dollars (\$10.00). (1977, c. 580, s. 1; 1979, c. 876, s. 1.)

§ 57B-21. Penalties and enforcement.

(a) The Commissioner may, in lieu of suspension or revocation of a certificate of authority under G.S. 57B-16, levy an administrative penalty in an amount not less than one hundred dollars (\$100.00) nor more than five hundred dollars (\$500.00), if reasonable notice in writing is given of the intent to levy the penalty and the health maintenance organization has a reasonable time within which to remedy the defect in its operations which gave rise to the penalty citation.

(b) Any person who violates this Chapter shall be guilty of a misdemeanor and on conviction may be punished by a fine not to exceed five hundred dollars (\$500.00) or by imprisonment for a period not exceeding two years or both, at the discretion of the court.

- (c) (1) If the Commissioner shall for any reason have cause to believe that any violation of this Chapter has occurred or is threatened, the Com-

missioner may give notice to the health maintenance organization and to the representatives or other persons who appear to be involved in such suspected violation to arrange a conference with the alleged violators or their authorized representatives for the purpose of attempting to ascertain the facts relating to such suspected violation, and, in the event it appears that any violation has occurred or is threatened, to arrive at an adequate and effective means of correcting or preventing such violation.

(2) Proceedings under this subsection shall not be governed by any formal procedural requirements, and may be conducted in such manner as the Commissioner may deem appropriate under the circumstances.

(d) (1) The Commissioner may issue an order directing a health maintenance organization or a representative of a health maintenance organization to cease and desist from engaging in any act or practice in violation of the provisions of this Chapter.

(2) Within 30 days after service of the order of cease and desist, the respondent may request a hearing on the question of whether acts or practices in violation of this Chapter have occurred. Such hearing shall be conducted pursuant to Chapter 150A of the General Statutes, and judicial review shall be available as provided by the said Chapter 150A.

(e) In the case of any violation of the provisions of this Chapter, if the Commissioner elects not to issue a cease and desist order, or in the event of noncompliance with a cease and desist order issued pursuant to subsection (d), the Commissioner may institute a proceeding to obtain injunctive relief, or seeking other appropriate relief, in the Superior Court of Wake County. (1977, c. 580, s. 1; 1979, c. 876, s. 1.)

§ 57B-22. Statutory construction and relationship to other laws.

(a) Except as otherwise provided in this Chapter, provisions of the insurance laws and provisions of hospital or medical service corporation laws shall not be applicable to any health maintenance organization granted a certificate of authority under this Chapter. This provision shall not apply to an insurer or hospital or medical service corporation licensed and regulated pursuant to the insurance laws or the hospital or medical service corporation laws of this State except with respect to its health maintenance organization activities authorized and regulated pursuant to this Chapter.

(b) Solicitation of enrollees by a health maintenance organization granted a certificate of authority, or its representatives, shall not be construed to violate any provision of law relating to solicitation or advertising by health professionals.

(c) Any health maintenance organization authorized under this Chapter shall not be deemed to be practicing medicine and shall be exempt from the provisions of Chapter 90 of the General Statutes relating to the practice of medicine. (1977, c. 580, s. 1; 1979, c. 876, s. 1.)

§ 57B-23. Filings and reports as public documents.

All applications, filings and reports required under this Chapter shall be treated as public documents. (1977, c. 580, s. 1; 1979, c. 876, s. 1.)

§ 57B-24. Confidentiality of medical information.

Any data or information pertaining to the diagnosis, treatment, or health of any enrollee or applicant obtained from such person or from any provider by any health maintenance organization shall be held in confidence and shall not be disclosed to any person except to the extent that it may be necessary to carry out the purposes of this Chapter; or upon the express consent of the enrollee or applicant; or pursuant to statute or court order for the production of evidence or the discovery thereof; or in the event of claim or litigation between such person and the health maintenance organization wherein such data or information is pertinent. A health maintenance organization shall be entitled to claim any statutory privileges against such disclosure which the provider who furnished such information to the health maintenance organization is entitled to claim. (1977, c. 580, s. 1; 1979, c. 876, s. 1.)

§ 57B-25. Severability.

If any section, term, or provision of this Chapter shall be adjudged invalid for any reason, such judgments shall not affect, impair, or invalidate any other section, term, or provision of this Chapter, but the remaining sections, terms, and provisions shall be and remain in full force and effect. (1977, c. 580, s. 1; 1979, c. 876, s. 1.)

STATE OF NORTH CAROLINA

DEPARTMENT OF JUSTICE

Raleigh, North Carolina

October 25, 1982

I, Rufus L. Edmisten, Attorney General of North Carolina, do hereby certify that the foregoing recompilation of the General Statutes of North Carolina was prepared and published by The Michie Company under the supervision of the Department of Justice of the State of North Carolina.

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